Supreme Court, U.S.
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No. 96-____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MILTON S. KRONHEIM & CO., INC.,
Petitioner,

v.

DISTRICT OF COLUMBIA, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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January 24, 1997

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QUESTIONS PRESENTED

1. Whether general state interests in facilitating enforcement of alcoholic beverage-related regulations constitute core interests protected by Section 2 of the Twenty-First Amendment that may justify otherwise unconstitutional discrimination against interstate commerce, where such interests are wholly unrelated to restricting the free flow of alcoholic beverages or promoting temperance.

2. Whether rational basis review or heightened scrutiny applies to a claim that an otherwise unconstitutional statute, which facially discriminates against interstate commerce, is saved from invalidation because it furthers a core Twenty-First Amendment interest.

LIST OF PARTIES

The parties to the proceeding before the United States Court of Appeals for the District of Columbia whose judgment is sought to be reviewed herein are as follows:

Milton S. Kronheim & Co., Inc.
The District of Columbia
Marion S. Barry, Jr., as Mayor of the District of Columbia
Mary Eva Candon, as Chairperson of the District of Columbia Alcoholic Beverage Control Board
Barbara L. Smith, as a member of the District of Columbia Alcoholic Beverage Control Board
James L. O'Dea, as a member of the District of Columbia Alcoholic Beverage Control Board
James C. Jefferson, as a member of the District of Columbia Alcoholic Beverage Control Board
Dennis Baas, as a member of the District of Columbia Alcoholic Beverage Control Board
Paul Waters, as Program Manager of the District of Columbia Alcoholic Beverage Control Board
Kathy Williams, as Administrator of the Alcoholic Beverage Control Division of the D.C. Department of Consumer and Regulatory Affairs

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states the following:

Petitioner Milton S. Kronheim & Co., Inc. states that it has no corporate parents or nonwholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Milton S. Kronheim & Co., Inc., respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 91 F.3d 193 (D.C. Cir. 1996). The opinion of the district court granting a preliminary injunction against the enforcement of the District of Columbia's local warehousing statute (Pet. App. 41a-57a) is reported at 877 F. Supp. 21 (D.D.C. 1995). The unpublished opinion of the district court granting summary judgment in favor of petitioner and entering final declaratory and in-

junctive relief against the District of Columbia is reproduced at Pet. App. 58a-63a.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit rendered its judgment and opinion on August 9, 1996. Petitioner timely filed a petition for rehearing and suggestion for rehearing en banc on September 9, 1996. The court of appeals denied the petition on October 28, 1996. Pet. App. 64a-65a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2 of the Twenty-First Amendment provides in pertinent part:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const. amend. XXI, § 2.

D.C. Code § 25-114(f) provides in pertinent part:

> No licensee may store beverages upon premises outside the District . . . .

STATEMENT OF THE CASE

This case concerns the relationship between the dormant Commerce Clause, which generally prohibits state and local governments from discriminating against interstate commerce, and Section 2 of the Twenty-First Amendment, which grants a limited exemption from that prohibition for laws restricting the "transportation or importation" of "intoxicating liquors" into a jurisdiction "for delivery or use therein." U.S. Const. amend. XXI, § 2. The decision below upheld the constitutionality of a District of Columbia statute requiring all D.C.-licensed alco-

holic beverage wholesalers, as a condition of doing business in the District, to store beverages in warehouses located only within the geographic confines of the District. Although the D.C. Circuit concluded that the local warehousing requirement was "patently discriminatory" and "facially violates the negative commerce clause," Pet. App. 15a, 21a, it upheld the law "as a valid exercise of the District's core power under the Twenty-first Amendment." Pet. App. 2a. The local warehousing requirement did not restrict the transportation or importation of alcohol into the District and served no temperance-related purpose; instead, the basis for the D.C. Circuit's holding was the District's claim—which was unsupported, and indeed contradicted, by the record—that a local warehousing requirement would facilitate inspection of warehouses and enforcement of alcoholic beverage control regulations. The decision below misinterprets both the substantive standards and the level of judicial scrutiny to be applied to discriminatory legislation under the Twenty-First Amendment and conflicts with the decisions of other courts in both respects.

1. Petitioner Milton S. Kronheim & Co., Inc. ("Kronheim") is a District of Columbia corporation licensed by the District to do business as an alcoholic beverage wholesaler. With the exception of the years of national Prohibition, Kronheim has been in continuous operation as a District wholesaler since its founding in 1903. Kronheim has a sister company in Maryland, The Kronheim Company, Inc., which is a Maryland-licensed alcoholic beverage wholesaler. For most of its existence, Kronheim and its Maryland affiliate have maintained and operated two separate warehouse facilities, along with their associated administrative offices, less than 30 miles apart.

Due to structural changes in the alcoholic beverage wholesaling industry and overall declines in alcohol consumption, Kronheim found, in late 1994, that it could no longer operate profitably in the District of Columbia under

its existing, dual-warehouse arrangement. After careful study, Kronheim's executives concluded that the only way to ensure Kronheim's continued survival was to consolidate Kronheim's warehouse operations with those of its Maryland affiliate at a site near the center of Kronheim's market in Washington, D.C. and the Maryland company's principal markets in Baltimore and the Washington suburbs. By consolidating the warehouse facilities at the hub of the two companies' combined service area, Kronheim could realize substantial cost savings that, by themselves, would be sufficient to ensure its continued profitability. A warehouse ideally suited to Kronheim's needs became available in January 1995 in Jessup, Maryland.

2. A single barrier stood between Kronheim and efficient consolidated operation from the Jessup warehouse: the District of Columbia Wholesale Liquor Industry Storage Act ("the Act"). Passed by the D.C. City Council in 1986, the Act states in pertinent part that "[n]o licensee may store beverages upon premises outside the District." D.C. Act 6-168, D.C. Stat. 327 (1986), codified at D.C. Code § 25-114(f) (1988). The intent and effect of the Act was to require D.C.-licensed alcoholic beverage wholesalers such as Kronheim, as a condition of doing business in the District, to maintain all of their warehouse facilities within the District's borders.

The Act had first been introduced in the District Council at the behest of the Teamsters union in 1981, 1983, and 1985 as the "Wholesale Liquor Industry Job Protection Act." Pet. App. 66a-68a; *Quality Brands, Inc.* v. *Barry*, 715 F. Supp. 1138, 1139 (D.D.C. 1989), *aff'd mem.*, 901 F.2d 1130 (D.C. Cir. 1990) (per curiam). Teamsters Local 639 sought by means of this legislation to preserve its jurisdiction over warehouse jobs that were moving to Maryland as D.C.-licensed wholesalers moved their warehouses to that state with the consent of the D.C. Alcoholic Beverage Control Board ("ABC Board"). Pet. App. 25a-26a.

In January 1986, the Council's Committee on Consumer and Regulatory Affairs held hearings on the bill. At the hearings, no regulatory justification was ever offered in support of the legislation. Instead, the only reasons offered in support of the Job Protection Act were the preservation of jobs within the District, the maintenance of District tax revenues, and the need to eradicate competitive advantages enjoyed by wholesalers operating in interstate commerce over those operating solely within the District. Pet. App. 69a-82a. The testimony of the witness who spoke on behalf of the executive branch was typical:

> The Executive supports this bill because *it will create and protect jobs for District of Columbia residents.* This bill would also increase the tax base because current and prospective *licensees would have to use facilities in the city* to store their beverages.

Pet. App. 74a (emphasis added). When Councilman John Ray submitted his Committee Report in March of 1986, it, too, contained no discussion of any regulatory or enforcement-related purpose for the bill, citing only the need to avoid "depriving the District of additional jobs for its citizens" as the reason the Job Protection Act should be passed. Pet. App. 80a.

The title of the Act, but not its substance, was changed when the bill finally came before the full Council, after the Council's General Counsel opined that the bill might run afoul of the Commerce Clause under this Court's decision in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), due to the exclusively protectionist nature of the justifications offered in support of it. Pet. App. 87a-89a; *Quality Brands*, 715 F. Supp. at 1139-40. In response to legal counsel's objections, the Act was renamed the "Wholesale Liquor Industry Storage Act," and Councilman Ray placed a statement into the record to the effect that the Act was necessary to facilitate the District's efforts "to check [wholesalers'] warehouses to make sure

that they're in compliance with the ABC laws of the District of Columbia," including those governing posting of licenses, tagging of trucks, and maintenance of tax records. Pet. App. 85a-86a.

3. Kronheim filed this lawsuit in the United States District Court for the District of Columbia on February 2, 1995, seeking to enjoin enforcement of the Act, so that Kronheim could purchase and use the Maryland warehouse to operate efficiently in interstate commerce. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Kronheim claimed that the Act constituted a local content requirement—it required Kronheim to purchase one of its principal factors of production, commercial real estate, within the District—that was virtually per se invalid under applicable Commerce Clause principles.

4. The district court conducted a full evidentiary hearing on Kronheim's preliminary injunction motion. No witness, including the member of the ABC Board who testified on behalf of the District, testified that the District either needed or wanted to inspect wholesale warehouses, and the District introduced no evidence that it had ever inspected any wholesaler's warehouse or goods prior to distribution. It was undisputed that in Kronheim's 92-year history, the District government had *never* inspected Kronheim's inventory—or anything else —at its D.C. alcoholic beverage warehouses. Pet. App. 100a-101a. No witness or document suggested that warehouse inspections were necessary or even helpful to the enforcement of the District's ABC laws, virtually none of which pertains to the means, methods, or conditions of wholesale storage,[1] and there was no evidence that inspections or other enforcement activities, if they were ever to occur, could not be performed adequately at warehouses located a short distance outside the city.

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[1] *See* D.C. Mun. Regs., tit. 23, §§ 1202-1203; 35 D.C. Reg. §§ 1202-1203 (1988) (regulations applying to wholesalers).

Moreover, the record revealed that the District had been allowing D.C.-licensed wholesalers to maintain warehouses in Maryland since the mid-1960s without incident. Pet. App. 80a, 98a, 104a, 107a-109a. In 1993, seven years after passage of the Act, the ABC Board itself expressly found, in allowing yet another wholesaler to move its warehouse to Maryland, that "[t]he DC ABC Board's inspection and enforcement authority will not be compromised by temporary storage in Maryland." Pet. App. 113a. Further, it was undisputed that Kronheim's records, trucks, and personnel would remain equally available to D.C. authorities after consolidation of its warehouse operations in Maryland and that Kronheim was legally required to permit, and to facilitate, inspections of the Maryland warehouse if D.C. authorities ever undertook to perform such an inspection. Pet. App. 100a; *cf.* Pet. App. 108a-109a.[2]

5. After the evidentiary hearing, the district court granted Kronheim's motion for a preliminary injunction. The district court held that the District was collaterally estopped from disputing that the Act facially discriminated against interstate commerce, failed to survive strict scrutiny, and was not insulated from Commerce Clause review by the Twenty-First Amendment, based upon the prior decision in *Quality Brands, Inc.* v. *Barry*, 715 F. Supp. 1138 (D.D.C. 1989), *aff'd mem.*, 901 F.2d 1130 (D.C. Cir. 1990) (per curiam), in which the identical issues had been litigated and decided adversely to the District and affirmed on appeal. Pet. App. 48a-50a. In that litigation, the full history of the passage of the Act

[2] All D.C.-licensed wholesalers are required by law to "allow any member of the Board, any investigator of the Board, or any member of the Metropolitan Police Department full opportunity to examine, at any time during business hours, the premises where any beverage is . . . kept . . . for which a license has been granted," regardless of its location. D.C. Mun. Regs., tit. 23, § 707.1; 35 D.C. Reg. § 707.1 (1988). Failure to allow inspection could subject the wholesaler to suspension or revocation of its license. *See* D.C. Code § 25-118(a).

had been examined, and the district court had found as a fact that "[t]he practical effect of the Act would appear to be minimal from the standpoint of the District's regulatory interests." *Quality Brands*, 715 F. Supp. at 1141. That finding never has been disturbed. With respect to the sole issue not decided in *Quality Brands*, the district court rejected the District's argument that the 1934 ABC Act passed by Congress authorized the District to require local warehousing or itself imposed such a requirement. Pet. App. 50a-54a. After both sides had the opportunity to develop a full summary judgment record, which contained no additional evidence to support the District's asserted regulatory interests, the district court confirmed its findings and granted a declaratory judgment and permanent injunction against enforcement of the District's local warehousing requirement. Pet. App. 61a-62a.

6. A divided panel of the D.C. Circuit reversed. The panel majority first held that the district court had erred in collaterally estopping the District from relitigating the Commerce Clause and Twenty-First Amendment issues.[3] Pet. App. 5a-7a. On the merits, the Court agreed with the district court that the 1934 ABC Act passed by Congress "did not in fact mandate the [local] storage requirement," Pet. App. 11a, and held that the D.C. Council's enactment was "patently discriminatory" because it "deprives out-of-state businesses access to a local market" and "requires business operations to be performed in the District even if they could be performed more efficiently elsewhere." Pet. App. 15a. The Court held that the Act would likely fail the required strict constitutional scrutiny

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[3] The dissent argued that the District should not have been relieved of the collateral estoppel effect of the *Quality Brands* ruling; for that reason, the dissent did not reach the merits of the Twenty-First Amendment question. Pet. App. 25a-40a (Henderson, J., dissenting). Petitioner agrees with the dissent but believes that the panel majority's collateral estoppel holding is not worthy of this Court's review and so has not presented the question in this petition.

if it "dealt with any industry not governed by the Twenty-first Amendment—that is, any industry except alcoholic beverages." Pet. App. 17a. But because the Act regulated commerce related to alcoholic beverages, the majority applied a different level of scrutiny under the Twenty-First Amendment and upheld the constitutionality of the local warehousing requirement.[4]

The majority correctly observed that, notwithstanding early suggestions to the contrary in this Court's jurisprudence, the states' Twenty-First Amendment immunity from the otherwise applicable norms of the Commerce Clause "has in more recent years been held far less than absolute" and that this Court's modern decisions "ha[ve] been consistently emphasizing limitations on the Twenty-first Amendment powers of the states." Pet. App. 17a, 18a-19a. Nonetheless, the panel gave this Court's decision in *Bacchus Imports, Ltd.* v. *Dias,* 468 U.S. 263 (1984), which it identified as the "current authoritative delineation of the relationship between the Commerce Clause and the Twenty-first Amendment," Pet. App. 17a, an exceptionally restrictive reading. It distinguished *Bacchus* on the ground that the law in question in that case was purely protectionist in inspiration; the only justification Hawaii had offered in defense of it "was the promotion of local industry." Pet. App. 18a.

By contrast, the panel majority reasoned, the District here had claimed in its appellate briefs that the local warehousing statute served enforcement and inspection interests, which the court classified as "core . . . purposes protected by section 2 of the Twenty-first Amendment." Pet. App. 18a.[5] The court acknowledged that protectionism

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[4] The D.C. Circuit also held that the District of Columbia was to be treated like a state for Twenty-First Amendment purposes. Pet. App. 9a. Kronheim does not challenge that conclusion in this Court.

[5] In addition to the putative interest in inspecting wholesale warehouses articulated by Councilman Ray, the District made pass-

was likely a purpose of the Act, Pet. App. 18a, but held that the District's claim of enforcement-related interests meant that "the legislative body operated with a mixed motive." Pet. App. 18a. This mixed motive, in the panel majority's view, distinguished this case from *Bacchus* and was sufficient to place the Act "squarely within the [Twenty-First] Amendment's ambit." Pet. App. 19a. In reaching this conclusion, the court never considered the factual record but relied solely on the existence of "D.C.'s *claimed* motives of legitimate state interests" in warehouse inspection. Pet. App. 19a (emphasis added) (internal quotation omitted). Thus, based upon the arguments of counsel and the single statement of Councilman Ray made in anticipation of litigation,[6] the court concluded that "although the Act facially violates the negative commerce clause, it is supported by a clear concern for the core enforcement function of the Twenty-First Amendment." Pet. App. 21a.

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ing references to another regulatory interest allegedly served by the Act: the maintenance of a "three-tier system" of alcoholic beverage distribution, in which manufacturers, wholesalers, and retailers are kept separate from one another. The decision below does not rely on this asserted interest, and the record established without contradiction that the District maintains no consistent separation between the three tiers of alcoholic beverage distribution. *See, e.g.*, D.C. Code § 25-112; 35 D.C. Reg. §§ 204.2, 1300-1301.3 (establishing direct retailer importing from out-of-District producers without use of a D.C.-licensed wholesaler); D.C. Code § 25-111(a)(3) (allowing wholesalers to sell beer and wine directly to consumers without intermediation by a retailer); D.C. Code § 25-113(a) (permitting manufacturers to own District wholesalers).

[6] The D.C. Circuit also cited the existence of similar laws in other states as support for "the legitimacy of the District's claims." Pet. App. 19a. For obvious reasons, however, the fact that some other states have enacted similar protectionist legislation is entirely irrelevant to the constitutional analysis. *See, e.g., Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 576 (1986) (striking down price affirmation statute where 20 other states had similar laws).

REASONS FOR GRANTING THE PETITION

This case presents unresolved questions of fundamental importance concerning the proper interpretation of Section 2 of the Twenty-First Amendment and the relationship between that Amendment and the dormant Commerce Clause. These questions involve the identification of the core interests protected by the Twenty-First Amendment and the level of judicial scrutiny that should be employed in evaluating the constitutionality of alcoholic beverage-related legislation that blatantly discriminates against interstate commerce. Although this Court has addressed conflicts between the Twenty-First Amendment and the Commerce Clause on prior occasions,[7] it has never directly answered these issues, which have produced considerable confusion and disuniformity in the lower courts. The questions presented are important, because their answers determine the extent to which every state, territory, or possession of the United States may discriminate against interstate commerce that relates to alcoholic beverages. Review of the D.C. Circuit's decision is therefore warranted.

I. THE DECISION BELOW SQUARELY PRESENTS THE TWO MOST SIGNIFICANT UNRESOLVED QUESTIONS CONCERNING THE APPLICATION OF THE TWENTY-FIRST AMENDMENT IN COMMERCE CLAUSE CASES.

1. The decision below rests on two basic propositions of law regarding the scope of state power under the Twenty-First Amendment. First, the D.C. Circuit held that general state interests in facilitating enforcement of alcoholic beverage-related regulations are core interests

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[7] *See, e.g., Healy* v. *The Beer Inst.*, 491 U.S. 324 (1989); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); *State Bd. of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936).

protected by Section 2 of the Twenty-First Amendment. Notwithstanding that the language of the Twenty-First Amendment encompasses only those laws that restrict the "transportation or importation" of alcoholic beverages into a state and that this Court has suggested that the Amendment is primarily designed to permit the states "to promote temperance," *Bacchus*, 468 U.S. at 276, the D.C. Circuit held that a general interest in facilitating warehouse inspection, entirely unrelated to restricting commerce in alcoholic beverages or promoting temperance, is sufficient to override the compelling national interest in free interstate trade. Pet. App. 19a ("Despite the mixing with the tainted motive of protectionism, D.C.'s claimed motives of legitimate state interests which would be promoted by requiring geographic proximity of warehouses, *e.g.*, auditing company records, monitoring compliance with ABC laws, monitoring licenses, checking tax forms for audits, etc., falls squarely within the state's core enforcement powers over alcohol.") (internal quotation omitted).

Second, the D.C. Circuit employed deferential, rational basis-type review in evaluating the District's asserted regulatory interests. Despite Kronheim's urging, the Court did not evaluate the District's asserted inspection and enforcement interests in light of the factual record to assess whether those interests were substantial or genuine or would be materially advanced by the Act to a degree not possible through other, less restrictive means.[8] Pet.

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[8] Had the court done so, it plainly could not have upheld the Act; even a cursory testing of the District's asserted interests against the factual record revealed them to be insubstantial or nonexistent. The Act could not be justified by the District's asserted need to inspect warehouses in order to enforce ABC laws when (1) there are virtually no ABC laws that pertain to activities at wholesale warehouses, (2) the District had never inspected a wholesale warehouse in the past and did not claim that it would

App. 18a-19a. Instead, the Court simply accepted at face value the eleventh-hour statement by a single District Councilmember, made in anticipation of litigation, that the Act was designed to serve regulatory interests. Pet. App. 19a (the Act is supported by regulatory interests "as set out in the councilman's statement").

2. The scope of the core concerns of the Twenty-First Amendment and the appropriate level of judicial scrutiny are the two principal unresolved issues in cases in which the Twenty-First Amendment comes into conflict with the Commerce Clause. The Twenty-First Amendment, ratified in 1933, accomplished two basic purposes. First, Section 1 of the Amendment repealed the Eighteenth Amendment and, with it, national Prohibition. Second, Section 2 granted the states a degree of regulatory authority over the new commerce in alcoholic beverages. See *44 Liquormart, Inc.* v. *Rhode Island,* 116 S. Ct. 1495, 1514 (1996). Virtually from the moment of ratification, however, it has been unclear precisely how much regulatory authority the states derived from the Twenty-First Amendment and the extent to which Section 2 was intended to permit the states to discriminate against interstate commerce related to the trade in alcoholic beverages. See *Bacchus,* 468 U.S. at 274 (acknowledging "the obscurity of the legislative history of § 2" and the lack of a "clear consensus concerning the meaning of the provision").

Two points are clear. First, the Twenty-First Amendment "created an exception to the normal operation of the Commerce Clause." *Craig* v. *Boren,* 429 U.S. 190, 206 (1976). By its terms, Section 2 recognizes that the states may restrict or prohibit the "transportation or im-

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do so in the future, and (3) D.C.-licensed wholesale warehouses had operated in Maryland with the District's express permission for nearly three decades without presenting any regulatory problems, and Maryland warehouses were, both by consent of the licensees and by regulation, fully available for the District's inspection. *See supra* pp. 6-7 & notes 1, 2.

portation" of "intoxicating liquors" into their borders "for delivery or use therein"—*i.e.*, that the states may elect to be entirely or partially dry. Without the Amendment, this would clearly be forbidden by the Commerce Clause.

Conversely, it is also clear that the exception created by Section 2 is not unlimited, and "that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." *Bacchus*, 468 U.S. at 275. At a bare minimum, this Court's decision in *Bacchus* stands for the proposition that a purely protectionist law, which is unsupported by even a claimed regulatory interest, cannot be saved from invalidation by Section 2 of the Twenty-First Amendment. See *id.* at 276.

In between these two poles lie the vast majority of cases, in which a state claims that an otherwise impermissible discrimination related to the commerce in alcoholic beverages is supported by a legitimate regulatory purpose. In such cases, this Court has suggested that a reviewing court must engage in a " 'pragmatic effort to harmonize state and federal powers.' " *Bacchus*, 468 U.S. at 275 (quoting *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980)). The essential question is " 'whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.' " *Id.* at 275-76 (quoting *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984)). If the asserted interests fall outside the "clear concern[s] of the Twenty-first Amendment," then normal Commerce Clause principles apply, and the Amendment provides no shelter. *Id.* at 276. If, on the other hand, a discriminatory law advances a "clear concern" of the Twenty-First Amendment, the law should ordinarily prevail against Commerce Clause attack.

Within this framework, there are two important subsidiary questions. First, what state interests "are so related

to the powers reserved by the Twenty-first Amendment" that they constitute the "clear concern[s]" or core interests that trigger the Amendment's application? Second, if a state asserts such an interest, what level of scrutiny should a reviewing court apply to determine whether that interest is sufficiently implicated to justify the discrimination in question? Is the state's asserted interest accepted at face value, as it was here, or does the state bear an evidentiary burden to establish that its Twenty-First Amendment interest is substantial and that the discriminatory law directly advances it? These are the two questions squarely presented in this case.

3. This Court's decisions have thus far left both of these questions unanswered.

a. With respect to the core interests protected by the Twenty-First Amendment, this Court's decisions have given sharply conflicting signals. See *Indiana Wholesale Wine & Liquor Co.* v. *State ex rel. Indiana Alcoholic Beverage Comm'n*, 662 N.E.2d 950, 996 (Ind. Ct. App. 1996) (transfer granted Sept. 18, 1996) ("[e]xactly what interests constitute 'core concerns' of the Twenty-first Amendment is, unfortunately, not easily discernible" from the Supreme Court cases). Early cases took an extremely broad view of the Amendment's core purposes, stating that "[t]he Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors . . . unfettered by the Commerce Clause." *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132, 138 (1939); see also *State Bd. of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936). This view implies, as the D.C. Circuit held below, Pet. App. 19a, that the Amendment grants the states "plenary power to regulate and control . . . the distribution, use, or consumption of intoxicants within [their] territory." *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, 346 (1964).

In recent decades, however, this Court has retreated from this broad view of the Amendment's core purposes. Since 1939, this Court has not upheld under the Twenty-First Amendment any state law that discriminates against interstate commerce, and it has *never* upheld a statute, like the one at issue in this case, that discriminates against an article of commerce other than alcoholic beverages themselves.[9] Moreover, the Court's recent cases have discussed the core interests protected by the Amendment in terms much more closely tied to the language of Section 2 and to the evident purpose of that Section, which was to preserve the states' "local option" to vote themselves dry or partially dry or to adopt blue laws discouraging alcohol consumption in the wake of the repeal of Prohibition. See *Loretto Winery Ltd.* v. *Gazzara*, 601 F. Supp. 850, 856 (S.D.N.Y.), *aff'd sub nom. Loretto Winery Ltd.* v. *Duffy*, 761 F.2d 140 (2d Cir. 1985) (per curiam).

Thus, in *Bacchus*, this Court struck down a discriminatory tax regime designed to protect locally manufactured liquors because that regime was not "designed to promote temperance" and was therefore "not entitled to the same deference as laws enacted to combat the evils of an unrestricted traffic in liquor." *Bacchus*, 468 U.S. at 276. In a similar vein, the Court recently described "the core § 2 power" as the power "directly to regulate

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[9] By its terms, the Twenty-First Amendment does not permit the states to regulate or prohibit the "transportation or importation" of any article of commerce other than "intoxicating liquors." *See, e.g., 44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495, 1514 (1996) ("§ 2 delegated to the several States the power to prohibit commerce in, or the use of, *alcoholic beverages*") (emphasis added); *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 346 (1987) ("Section 2 . . . reserves to the States the power to regulate, or prohibit entirely, the transportation or importation *of intoxicating liquor*") (emphasis added); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 712 (1984) ("§ 2 reserves to the States power to impose burdens on interstate commerce *in intoxicating liquor*") (emphasis added).

the sale or use of liquor." *Capital Cities Cable*, 467 U.S. at 713. Under this formulation, laws regulating aspects of the trade in alcoholic beverages other than sale or use, while they might constitute valid exercises of state police powers, fall outside the scope of Section 2 and, as such, remain fully subject to the ordinary constraints of the Commerce Clause. *Cf. 44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495, 1514 (1996) (noting that "the States' inherent police powers" are an independent source of regulatory authority over alcoholic beverages). The Court repeated this formulation just last Term, describing Section 2 as having only "delegated to the several States the power to prohibit commerce in, or the use of, alcoholic beverages." *Id.*

Nonetheless, some courts, including the D.C. Circuit below, have seized upon other language in this Court's decisions to justify adherence to the earlier, broader view of the Twenty-First Amendment. In *Bacchus*, for example, this Court explained that Hawaii's discriminatory tax is invalid because Hawaii did "not seek to justify its tax on the ground that it was designed to promote temperance *or to carry out any other purpose of the Twenty-first Amendment.*" *Bacchus*, 468 U.S. at 276 (emphasis added). Three years after *Bacchus*, the Court quoted a broad dictum from a pre-*Bacchus* case stating that Section 2 " 'grants the States virtually complete control over whether to permit importation or sale of liquor *and how to structure the liquor distribution system.*' " *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 346 (1987) (quoting *Midcal Aluminum*, 445 U.S. at 110) (emphasis added). Even the recent decision in *44 Liquormart* quotes language from the 1939 decision in *Ziffrin* that articulates a broad view of states' powers under Section 2. See *44 Liquormart*, 116 S. Ct. at 1514 ("The States' regulatory powers over this segment of commerce is . . . largely 'unfettered by the Commerce Clause.' ") (quoting *Ziffrin*, 308 U.S. at 138).

b. The existing decisions of this Court also provide no firm guidance concerning the second major unresolved issue of Twenty-First Amendment interpretation in Commerce Clause cases: the level of judicial scrutiny that applies to asserted Twenty-First Amendment interests. See *Indiana Wholesale*, 662 N.E.2d at 965 ("In 'negative' Commerce Clause cases, . . . the standard of scrutiny a court is to apply is not so clear."). Although *Bacchus* did not directly address the question, the D.C. Circuit apparently read that decision to suggest that a discriminatory law can be saved from invalidation based merely upon a finding that the state has asserted a core Twenty-First Amendment interest in support of it. See *Bacchus*, 468 U.S. at 276 (statute invalid because "the State does not *seek* to justify" it based upon a core Twenty-First Amendment concern) (emphasis added).

At the same time, a number of Twenty-First Amendment cases involving conflicts with federal law norms other than the Commerce Clause have indicated that some form of heightened scrutiny of Twenty-First Amendment defenses is appropriate. In *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335 (1987), for example, the Court held that the Twenty-First Amendment did not save a resale price maintenance scheme from invalidation under the Sherman Act, because the record contained no finding of fact that the law in question "has been effective" in serving "the State's unsubstantiated interest in protecting small retailers." *Id.* at 350; see also *Capital Cities Cable*, 467 U.S. at 715 (rejecting law restricting wine ads on cable television that was "a reasonable, albeit limited, means of furthering the goal of promoting temperance" because state's "selective approach" demonstrated that its interest was "modest" and "limited"); *Midcal Aluminum*, 445 U.S. at 113-14 (rejecting "unsubstantiated state concerns" where "[n]othing in the record in this case" demonstrated that the law materially served them). Under the reasoning of these cases, a state attempting to establish Twenty-

First Amendment immunity for an otherwise unconstitutional law would be required to adduce evidence that the law actually and materially served core Twenty-First Amendment interests.

4. The questions regarding the scope of the core interests protected by the Twenty-First Amendment and the level of scrutiny to be applied to Twenty-First Amendment defenses are of considerable importance. The answers to these questions will in practice determine the validity of most discriminatory regulation of alcoholic beverage-related activities. What is fundamentally at issue, therefore, is whether the Twenty-First Amendment is, as its language and history suggest, a modest restoration of the pre-Prohibition power of the states to determine the extent to which alcoholic beverages of various types could be transported or consumed within their borders,[10] or, instead, an unprecedented grant of total local control over all commerce related to alcoholic beverages and a blanket exemption from the normal strictures of the Commerce Clause for alcohol-related legislation.

If the Twenty-First Amendment protects only those laws that restrict the sale or use of alcoholic beverages and promote temperance, and those laws must actually and materially advance such interests, then the Twenty-First Amendment grants only a narrow exemption from the Commerce Clause. Laws that directly regulate the type or quantity of alcoholic beverages that could be brought into the state, or the days, times, or places at which they could be consumed or sold, would likely survive scrutiny. A statute, like that here, which regulates only the physical location of warehouses, and does so solely by reference to state lines, would be invalid under these standards. If, on

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[10] Prior to Prohibition, the states were given this power by a federal statute, the Webb-Kenyon Act, originally enacted in 1913, the language of which is closely mirrored by that of Section 2 of the Twenty-First Amendment. *See* 27 U.S.C. § 122.

the other hand, the Twenty-First Amendment immunizes against Commerce Clause challenge any law that is rationally related to some articulable enforcement objective, then the Twenty-First Amendment provides the States broad—indeed, virtually unlimited—authority to regulate the alcoholic beverage industry without regard to the "strong federal interests in preventing economic Balkanization" embodied in the Commerce Clause. *Bacchus,* 468 U.S. at 276.

5. This case is an excellent vehicle for resolving the "[d]oubts about the scope of the [Twenty-First] Amendment's authorization" of discrimination against interstate commerce. *Bacchus,* 468 U.S. at 276. The decision below takes the broadest possible view of the Twenty-First Amendment and arrives at the result it does only by *both* classifying the District's asserted inspection interest as one of the "core enforcement purposes protected by Section 2 of the Twenty-first Amendment," Pet. App. 18a, *and* by accepting uncritically the District's "claimed motives." Pet. App. 19a. Without the first conclusion, the Twenty-First Amendment would not be implicated, and without the second, it would not be sufficient to immunize the Act, which, according to the undisputed facts in the record, does not actually or materially advance any genuine inspection or enforcement interest of the District. If either conclusion is reversed, the judgment below must be reversed, giving each issue independent significance for purposes of this Court's review.

Moreover, this is an ideal record on which to consider both of these questions. The District has not sought to justify the local warehousing statute in this litigation on temperance-related grounds. Indeed, the court in *Quality Brands* made a finding of fact, unchallenged in this litigation, that "[t]he Liquor Storage Act does not serve to promote temperance except incidentally, since all it does, in effect, is to say that residents of the District can drink as much as they want so long as they drink liquor stored

inside the District." *Quality Brands*, 715 F. Supp. at 1143. And the law in question here on its face does not "directly . . . regulate the sale or use of liquor"; it pertains only to warehousing. *Capital Cities Cable*, 467 U.S. at 713. Thus, this case isolates for decision the question whether the Twenty-First Amendment authorizes states to enact discriminatory alcoholic beverage-related legislation that does not restrict commerce in alcoholic beverages themselves or serve any temperance-related purpose but instead is justified solely by generalized enforcement or regulatory interests.

The case is also ideal for considering the appropriate level of judicial scrutiny under the Twenty-First Amendment. The factual record here is remarkable because it is wholly barren of evidence to support the District's claimed inspection interests and replete with evidence that belies those interests. It thus makes concrete what is at stake in the decision between the alternative levels of scrutiny and presents a perfect backdrop against which to consider the question whether a theoretically plausible but factually unsupported Twenty-First Amendment interest is sufficient to confer Twenty-First Amendment immunity. The clarity of the record ensures that no factual issues will arise to obscure the legal issues presented for decision.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS WITH RESPECT TO BOTH QUESTIONS PRESENTED.

In addition to cleanly presenting unresolved issues of considerable importance, the decision below conflicts with those of other federal and state courts. Lacking clear guidance from this Court, the lower courts have been struggling to determine the appropriate analysis to apply to conflicts between the Twenty-First Amendment and the Commerce Clause. See *Indiana Wholesale*, 662 N.E.2d at 965 ("Under the Supreme Court's jurisprudence to

date, it is unclear at first glance what approach a court is to take in determining precisely when a statute regulating liquor repugnant to the 'negative' Commerce Clause is 'saved' by the Twenty-first Amendment."). Not surprisingly, lower courts have employed analyses and reached results that cannot be reconciled with that of the D.C. Circuit below.

1. The D.C. Circuit's ruling that inspection of wholesale warehouses constitutes a "core enforcement power[]" under the Twenty-First Amendment conflicts with decisions of the Second and Fifth Circuit that have interpreted *Bacchus* to limit Twenty-First Amendment immunity solely to those measures that serve substantial temperance-related purposes. The Second and Fifth Circuits have expressly refused to permit generalized enforcement concerns of the type accepted by the D.C. Circuit to justify discrimination against interstate commerce.

In *Loretto Winery Ltd.* v. *Duffy*, 761 F.2d 140 (2d Cir.) (per curiam), *aff'g*, 601 F. Supp. 850 (S.D.N.Y. 1985), the Second Circuit invalidated a law permitting only locally-produced wine products to be sold in grocery stores. New York had sought to justify this law in part based on its greater regulatory control over local growers. The State claimed that it wished to experiment with allowing the sale of alcoholic beverages in grocery stores but felt it prudent to experiment only with locally-produced products, since these "tightly controlled products" are "licensed and regulated from the winery to the shelf." 601 F. Supp. at 857 (internal quotation omitted).

The Second Circuit rejected New York's claimed enforcement-related interest. The court of appeals expressly adopted the reasoning of the district court, which had undertaken an extensive, scholarly analysis of the history of Prohibition and its repeal and concluded that "Section 2 of the Amendment was intended to restore to the states the authority to promulgate local option temperance related controls concerning the sale and distribution of al-

coholic beverages within their borders, as they had done prior to the Noble Experiment." *Id.* at 859. Based upon this view and a reading of this Court's cases, the court held, directly contrary to the ruling of the D.C. Circuit below, that "[o]nly those state restrictions which directly promote temperance may now be said to be permissible under Section 2 of the Twenty-first Amendment." *Id.* at 861.

Likewise, in *Cooper* v. *McBeath*, 11 F.3d 547 (5th Cir), *cert denied*, 114 S. Ct. 2675 (1994), the Fifth Circuit struck down a three-year durational residency requirement for holders of Texas alcoholic beverage licenses. In that case, the State asserted an enforcement-related interest remarkably similar to the interest asserted here by the District of Columbia. Texas claimed that a durational residency requirement was necessary to permit alcoholic beverage control authorities to perform "an intensely local screening of each applicant's reputation in the community plus a complete, thorough business and financial investigation" prior to licensure. *Id.* at 554. Just as D.C. argued below that its ability to inspect warehouses would be compromised if they were located outside the District, Texas argued that its "ability to investigate an out-of-state applicant's reputation and qualifications is severely limited." *Id.* Unlike the D.C. Circuit, however, the Fifth Circuit held that "the state's interest in facilitating background checks of permit applicants . . . is not within the 'core concerns' of the Twenty-first Amendment." *Id.* at 555.

2. The D.C. Circuit's deferential, rational basis mode of review is also directly contrary to decisions of other courts, which have carefully scrutinized putative Twenty-First Amendment justifications and rejected those that the record revealed were insubstantial or unsubstantiated.[11] In

[11] The D.C. Circuit's deferential review also conflicts with the analyses employed by the Ninth Circuit and the California Supreme Court, which have applied heightened scrutiny to Twenty-First

Ivey v. *Bacardi Imports Co.*, 541 So. 2d 1129 (Fla. 1989), the Florida Supreme Court expressly rejected a similar argument for rationality review under the Twenty-First Amendment and refused to defer to a legislative recitation of legitimate purposes underlying a discriminatory tax scheme. See *id.* at 1135-38. Instead, it carefully evaluated "the substantiality of [the] asserted twenty-first amendment concern[s]," in light of the record, *id.* at 1137, and held that, even if those concerns "were supported by the evidence and were considered valid," *id.* at 1139, the poor tailoring of the legislative scheme to serve those concerns and the lack of supporting evidence rendered the legislation invalid and unprotected by the Twenty-First Amendment. See *id. at* 1139-40. Notably, the Florida Court rejected an argument that the discriminatory scheme was needed to enforce health regulations through quality-control inspections, because, precisely as here, no inspection program existed. See *id.* at 1135, 1139 & n.7.

The Second Circuit's decision in *Loretto Winery* also conflicts with the decision below. In *Loretto Winery*, the court assumed for purposes of analysis that one of the goals of the law allowing only low-strength, locally-produced wine products to be sold in grocery stores was the promotion of temperance. See 601 F. Supp. at 857. Unlike the D.C. Circuit below, however, the Second Circuit did not regard the mere assertion by New York of a core Twenty-First Amendment interest as the end of the analy-

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Amendment claims in the antitrust context. *See Miller* v. *Hedlund*, 813 F.2d 1344, 1352 n.7 (9th Cir. 1987) (assessing "the avowed purposes of the state rule and their closeness to the interests the Twenty-first Amendment serve[s] and the extent to which, in reality, the state rule serves its avowed purposes"); *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 579 P.2d 476, 494 (Cal. 1978) (striking down law claimed to promote temperance, a core Twenty-First Amendment concern, because expert studies "at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance" and because "there are other means to achieve the fundamental goals" of the law).

sis. Instead, the district court, whose reasoning was adopted in its entirety by the Second Circuit, carefully scrutinized the state's "claimed temperance related goal" and concluded that it was "insufficient to validate the statute when it served that interest only "minimally" and "alternatives less burdensome to interstate commerce" were available. *Id.* at 862-63.

Finally, the Virginia Supreme Court took an analytical approach at odds with that of the D.C. Circuit in *Heublein, Inc.* v. *Department of Alcoholic Beverage Control,* 376 S.E.2d 77 (Va. 1989). In *Heublein,* the Virginia Supreme Court considered the constitutionality of certain provisions of the Virginia Wine Franchise Act that favored Virginia wineries. In holding that these provisions violated the Commerce Clause and were not saved by the Twenty-First Amendment, the Virginia Court noted that it had to apply " 'careful scrutiny' " to the State's asserted Twenty-First Amendment interests. *Id.* at 80 (quoting *Midcal Aluminum,* 445 U.S. at 110). The Court observed that, unlike *Bacchus,* the statute in question "does not contain the avowed purpose to foster local wineries." *Id.* In marked contrast to the D.C. Circuit, however, the Virginia Supreme Court went on to review the legislative history of the Act and to form an independent judgment that the Act constituted "an invalid attempt to favor local wineries over out-of-state wineries." *Id.* at 80-81.

3. The decisions of the Second and Fifth Circuits and the Florida and Virginia Supreme Courts are impossible to reconcile with the decision below. Because this is an area of the law that is dotted with decisions of this Court, lower court cases tend to be focused on pronouncements from this Court. Accordingly, the lower courts rarely take express account of one another. Nevertheless, the results reached by these courts, and their applications of the governing law, are plainly inconsistent with those of the D.C. Circuit.

Under the reasoning of the cases discussed above, the District's local warehousing requirement clearly would have been invalidated. The District did not assert that the requirement promoted temperance, and its asserted inspection and enforcement interests were no different and no stronger than those rejected by the Second and Fifth Circuits. Moreover, the record made clear that the District's asserted interests were pretextual and that alternative means were readily available to serve them. By contrast, under the D.C. Circuit's ruling, the laws in *Loretto Winery*, *Cooper*, and *Ivey* would have been upheld. In those cases, New York, Texas, and Florida all asserted interests that the D.C. Circuit now accepts as part of "the state's core enforcement powers over alcohol" under the Twenty-First Amendment, which, for the D.C. Circuit, is the end of the analysis. Pet. App. 19a.

4. This conflict in authority produces intolerable inconsistency in an area—restrictions on interstate trade—in which national uniformity is peculiarly important. Absent review by this Court, some jurisdictions will have far broader latitude than others to discriminate against interstate commerce related to alcoholic beverages. In addition to the D.C. Circuit, the Supreme Courts of Georgia and Kansas appear to adhere to a view of the Twenty-First Amendment that gives those states almost unfettered power to regulate the liquor industry without regard to the requirements of the Commerce Clause.[12] Thus, at present, Kansas, Georgia, and the District of Columbia have the right to require the use of local warehouses or

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[12] *See Heublein, Inc.* v. *Georgia*, 351 S.E.2d 190, 196 (Ga. 1987) ("defraying the increased costs of regulating the importation into this state of intoxicating liquors" constitutes a "central concern[] of the Twenty-first Amendment" and justifies discriminatory tax); *Colby Distrib. Co.* v. *Lennen*, 606 P.2d 102, 109 (Kan. 1980) (Twenty-First Amendment empowers state to "adopt measures reasonably appropriate to effectuate those inhibitions and exercise full police authority in respect to them, unfettered by . . . the commerce clause") (internal quotation omitted).

to favor locally-produced alcoholic beverages, while the states in the Second and Fifth Circuits, as well as Florida and Virginia, have no such authority. Review by this Court is necessary to remedy this disuniformity in state regulatory powers under the Twenty-First Amendment.

III. THE DECISION BELOW HAS PERNICIOUS PRACTICAL CONSEQUENCES AND CREATES AN UNDULY BROAD SPHERE OF PERMISSIBLE DISCRIMINATION AGAINST ALCOHOLIC BEVERAGE-RELATED COMMERCE.

Under the D.C. Circuit's ruling, in order to defeat a Commerce Clause challenge to a law that facially discriminates against interstate commerce related to alcoholic beverages, a state need only articulate a theoretical enforcement-related rationale. The law would be upheld even if, as here, the law discriminates against an article of commerce other than alcoholic beverages, protectionism is the principal purpose of the law, and there is no evidence to support either the legitimacy of the asserted enforcement interest or the necessity of the means chosen to serve it. It is difficult to imagine a circumstance in which a state could not immunize discriminatory alcoholic beverage-related legislation under this lenient standard; it is almost always possible to concoct a facially plausible enforcement justification for a law pertaining to a closely-regulated industry like alcoholic beverage distribution, as this case amply demonstrates. Indeed, under the D.C. Circuit's ruling, the tax benefit for locally-produced beverages this Court struck down in *Bacchus* could itself have been upheld if Hawaii had simply sought to justify it as an incentive to increase consumption of alcoholic beverages whose production the state could inspect and whose purity it could ensure.

As a practical matter, therefore, the decision below gives the District of Columbia, as well as any other jurisdiction that adheres to the D.C. Circuit's view of the Twenty-First Amendment, broad and unprecedented au-

thority to enact legislation that discriminates against articles of commerce, such as warehouses, trucks, and computers, that play some role in the alcoholic beverage trade. The identical enforcement rationale offered by the District in support of its local warehousing requirement in this case would require that any of the following laws be sustained against Commerce Clause attack: a law requiring that all trucks used to deliver alcoholic beverages be garaged and maintained within the District; a law requiring that all computers that track orders and shipments of alcoholic beverages be located and serviced within the District; or a law requiring that all alcoholic beverage warehouse workers be D.C. residents. In each case, the District could claim that it needs the trucks, computers, or individuals to be within the District in order to preserve its ability to inspect goods and investigate and audit licensees' compliance with ABC laws. Such wide-ranging authority to discriminate against alcoholic beverage-related interstate commerce is far broader than Section 2 of the Twenty-First Amendment actually grants.

* * * *

In sum, review of the D.C. Circuit's judgment is warranted to resolve the longstanding tension in this Court's Twenty-First Amendment jurisprudence, to establish nationally uniform standards concerning the appropriate allocation of state and federal power over commerce related to the alcoholic beverage trade, and to prevent excessive and unnecessary discrimination against alcoholic beverage-related commerce that does not serve the original purposes of the Twenty-First Amendment.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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January 24, 1997

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 10, 1995 Decided August 9, 1996

No. 95-7053

MILTON S. KRONHEIM & COMPANY, INC.,
Appellee

v.

DISTRICT OF COLUMBIA, *et al.*,
Appellants

Consolidated with No. 95-7168

Appeals from the United States District Court
for the District of Columbia
(No. 95cv00226)

Before: SILBERMAN, SENTELLE and HENDERSON, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

Separate concurring opinion filed by *Circuit Judge* SILBERMAN.

Separate dissenting opinion filed by *Circuit Judge* HENDERSON.

SENTELLE, *Circuit Judge*: The District of Columbia appeals from an order of the United States District Court

preliminarily and permanently enjoining it from enforcing the Storage Act, D.C. Code § 25-114(f), which generally forbids alcoholic beverage licensees from storing beverages outside the District. The district court, relying on a prior district court opinion affirmed by this court without published opinion, held the Act to be an unconstitutional violation of the Interstate Commerce Clause. We determine that the District is not collaterally estopped by the prior opinion from defending the constitutionality of its Act. We therefore reach the merits of the controversy.

The District defends the storage requirement on three grounds. First, that the District of Columbia Alcoholic Beverage Control Act ("ABC Act"), a congressional enactment, authorizes the local warehousing requirement; therefore, the requirement is constitutional as federal statutes are not subject to the restrictions of the Commerce Clause. Second, even if the ABC Act is subject to the restrictions of the Commerce Clause, the local warehousing requirement does not violate the clause. And third, even if the requirement would otherwise violate the Commerce Clause, the Storage Act is constitutional as a valid exercise of the District's core power under § 2 of the Twenty-first Amendment to the Constitution. We hold that, although the ABC Act authorizes the local warehousing requirement, the Act and any statute enacted pursuant to it are subject to the restrictions of the Commerce Clause; but we also hold that the storage requirement, although facially inconsistent with the Commerce Clause, is constitutional as a valid exercise of the District's core power under the Twenty-first Amendment.

I. Background

In 1934, following the repeal of Prohibition, Congress enacted the ABC Act to regulate the importation and distribution of liquor within the District of Columbia. Act of Jan. 24, 1934, § 2; D.C. Code § 25-102. The Act created a three-tier system of distribution that, among

other things, required manufacturers, wholesalers and retailers to obtain licenses before "manufactur[ing] for sale, keep[ing] for sale, or sell[ing] any alcoholic beverage" within the District of Columbia. ABC Act §§ 9(a), 12; D.C. Code §§ 25-109(a)(1), 113. The Act also established an Alcoholic Beverage Control Board, which was authorized to issue, transfer and revoke any license under the Act. ABC Act §§ 4, 6; D.C. Code §§ 25-104, 106.

In addition, the ABC Act authorized the Commissioners (now the Council of the District of Columbia) to adopt rules to "control and regulate the manufacture, sale, keeping for sale, offer for sale, solicitation of orders for sale, importation, exportation, and transportation of alcoholic beverages in the District of Columbia." ABC Act § 7; D.C. Code § 25-107(a). Acting pursuant to this provision, in 1986 the Council enacted the District of Columbia Wholesale Liquor Industry Storage Act ("the Storage Act"). The Storage Act amended § 13 of the ABC Act by adding a sentence requiring that no alcoholic beverage wholesaler licensed by the District shall "store beverages upon premises outside the District, except that licensed wholesalers permitted by the Board to store beverages outside the District as of January 1, 1986, may continue to do so until July 27, 1988." D.C. Code § 25-114(f).

Appellee Milton S. Kronheim & Co., Inc. ("Kronheim"), a wholesaler of alcoholic beverages licensed under the ABC Act, distributing liquor, beer and wine to District of Columbia retailers, is authorized to store alcoholic beverages at two locations within the District. A Maryland affiliate of Kronheim, The Kronheim Company, Inc., is a licensed wholesale distributor of alcoholic beverages in Maryland. Kronheim desired to consolidate its warehousing operations in the District and Maryland by leasing a facility in Jessup, Maryland. Toward this end, Kronheim filed suit in district court on February 2, 1995, seeking to enjoin enforcement of the Storage Act.

In deciding this case, the district court relied upon an earlier district court decision in *Quality Brands, Inc. v. Barry*, 715 F. Supp. 1138 (D.D.C. 1989). In that case, Quality Brands, Inc., a licensed alcoholic beverage wholesaler in the District and a competitor of Kronheim, sought a declaratory judgment that the Storage Act was unconstitutional. The district court held that (1) the local warehousing requirement facially discriminated against interstate commerce in violation of the Commerce Clause, *Quality Brands, Inc.*, 715 F. Supp. at 1139-40; (2) the articulated purposes given for the requirement could not withstand the "strict scrutiny" accorded facially discriminatory legislation, *id.* at 1140-42; and (3) the Twenty-first Amendment did not shield the District's discrimination against interstate commerce, *id.* at 1142-43. Consequently, the *Quality Brands* court concluded that the local warehousing requirement violated the Commerce Clause and enjoined its enforcement. We affirmed that decision without a published opinion. *Quality Brands, Inc. v. Barry*, 901 F.2d 1130, 1990 WL 51795 (D.C. Cir. 1990) (per curiam).

In this case, the district court granted Kronheim's motion for a preliminary injunction, finding that Kronheim would suffer irreparable harm if its purchase of the Jessup warehouse did not go forward immediately. *Milton S. Kronheim & Co., Inc. v. District of Columbia*, 877 F. Supp. 21, 30 (D.D.C. 1995). The court held that the district court's decision in *Quality Brands* collaterally estopped the District from disputing the constitutionality of the Storage Act *Id.* at 26-27. The court also determined against the District an issue left open in *Quality Brands*: whether Congress in the ABC Act authorized the District to require local warehousing or itself imposed such a requirement. *Id.* at 27-29.

The District filed an interlocutory appeal from this preliminary injunction. On summary judgment, the district court confirmed its findings, issued a declaratory judgment and permanently enjoined enforcement of the

District's local warehousing requirement. The District appealed the final judgment and this court consolidated the two appeals. After the district court granted its preliminary injunction, Kronheim completed the Jessup warehouse transaction and is currently consolidating its inventory in the new warehouse.

II. Analysis

A. Collateral Estoppel

The first question we must address is whether the District is collaterally estopped from defending the constitutionality of the Storage Act because of the district court's opinion in *Quality Brands, Inc.* Offensive collateral estoppel precludes a defendant "from relitigating identical issues that the defendant litigated and lost against another plaintiff." *Jack Faucett Associates, Inc. v. AT&T Co.*, 744 F.2d 118, 124 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985).

Three conditions must be satisfied before a party can be estopped from relitigating an identical issue previously decided:

> (1) [T]he issue must have been actually litigated, that is contested by the parties and submitted for determination by the court.
>
> (2) [T]he issue must have been "actually and necessarily determined by a court of competent jurisdiction" in the first trial.
>
> (3) [P]reclusion in the second trial must not work an unfairness.

Id. at 125 (quoting *Otherson v. Department of Justice, INS*, 711 F.2d 267, 273 (D.C. Cir. 1983)). The constitutionality of the Storage Act was certainly actually litigated, contested by the parties, and submitted for determination by the court in *Quality Brands*. Further, it was "actually and necessarily determined by a court of

competent jurisdiction," at least at the district court level, in that litigation. However, our unpublished affirmance of the district court decision, we must confess, provided no clarity as to what was actually or necessarily determined on appeal. Although our memorandum accompanying the judgment in that matter recited that we affirmed that decision "substantially for the reasons articulated in the opinion of the district court," we expressly stated that at least one other "substantial argument" had not been properly raised and that we did not determine the Commerce Clause issue. Therefore, the district court, obviously unable to reverse our prior decision but receiving little guidance from it for precedential, purposes quite justifiably found the first two elements of collateral estoppel to be present. Also quite justifiably, the district court did not undertake a massive investigation of the further element, as that court would have been in no position to declare the Storage Act constitutional anyway in view of the circuit having reached the result we did in *Quality Brands.* We are not so constrained.

While we must follow existing circuit law as established in our precedent, "we are bound only by prior *published opinions* of this Circuit and not by other means of deciding cases." *United States v. North,* 910 F.2d 843, 881 (D.C. Cir. 1990) (emphasis in original). We are therefore free in this published opinion to depart from the conclusion reached in our earlier unpublished memorandum. Kronheim understandably offers our unpublished disposition for its preclusive effect. Our circuit rules, while forbidding the citation of unpublished opinions as precedent, nonetheless permit use of those dispositions for preclusion. D.C. Cir. R. 28(c). We do not, however, find preclusion here. Despite the presence of the first element of collateral estoppel, the presence of the second element is much less certain. The third element, that is, that "preclusion in the second trial must not work an unfairness," is not likely to be present where the first or second is unclear. That is, logically there is a fair prob-

ability of unfairness in estopping the relitigation of an issue where the fullness of its first litigation is uncertain. Because we have concluded that our decision in *Quality Brands* did not necessarily involve adjudication of the issue before us, and because we have concluded that the district court was misled by our disposition, we have re-examined the fairness of applying collateral estoppel. We hold that the District was not collaterally estopped from litigating the issues decided in *Quality Brands*. We will therefore proceed to examine the merits of the District's arguments on the constitutionality of the statute.[1]

B. The Constitutional Issues

The constitutional considerations before us are not simple ones to decide, or even to express. Basically, Kronheim's position, tracking the position of the plaintiff in *Quality Brands*, is that the Storage Act, by discriminating against out-of-state storage of alcoholic beverages by wholesalers, unconstitutionally burdens interstate commerce under the Commerce Clause of the Constitution, Art. I, § 8, cl. 3. The *Quality Brands* decision held that it did, that the justifications offered for that discrimination did not pass strict scrutiny, and that the Twenty-first Amendment did not shield the District's Act from interstate Commerce Clause analysis. Because we have held that the *Quality Brands* decision does not have preclusive effect, we will consider the District's answers to Kronheim's arguments.

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[1] The dissent takes our result to task for "rais[ing] a number of questions, [including] how today's decision will affect Quality Brands." Dissent at 213 n.9. We obviously do not decide that question as it is not before us, but as our dissenting colleague herself tacitly recognizes, that question will be governed, not by nonmutual offensive collateral estoppel, but rather by case preclusion between the parties to the very action in question, the form of preclusion traditionally known as *res judicata*. *See* Dissent at 213 n.9, and authorities collected therein. Should the District attempt to act against Quality Brands without further legislative enactment, the effects of this decision on the relationship between the parties to the original action will then be ripe for decision.

Before we analyze the merits of the question, we will briefly review the application of the Commerce Clause and the Twenty-first Amendment to enactments of the District of Columbia as it is not immediately apparent that either constitutional provision applies, though after appropriate study, we conclude that each does.

1. The Commerce Clause

Article I, § 8, cl. 3, provides only that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Though the face of this provision does not appear to preclude anything, the Supreme Court has long held that the clause not only grants regulatory power to Congress, but also "denies the States the power unjustifiably to discriminate against or burden [interstate commerce]." *Oregon Waste Systems, Inc. v. Department of Environmental Quality,* 511 U.S. 93, ——, 114 S. Ct. 1345, 1349 (1994) (citing, *inter alia, Welton v. Missouri,* 91 U.S. 275 (1876)). The Framers intended this "plenary authority over interstate commerce . . . 'to avoid the tendencies toward economic Balkinization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" *Id.* (quoting *Hughes v. Oklahoma,* 441 U.S. 322, 325-26 (1979)).

This "negative commerce clause" would clearly provide the framework for analysis of the Storage Act if the District of Columbia were a state. That is, we would necessarily examine the legislation to determine if it unjustifiably . . . discriminat[ed] against or burden[ed] the interstate flow of articles of commerce." *Oregon Waste Systems,* 114 S. Ct. at 1349. But D.C. is not a state. Nonetheless, the same analysis applies. Our precedents dictate that we apply to local legislation of the District the same interstate commerec analysis as we would to state laws. *See, e.g., Electrolert Corp. v. Barry,* 737 F.2d 110 (D.C. Cir. 1984) (applying negative commerce clause

analysis to District legislation banning the possession of radar detectors). Therefore, should we determine that state legislation such as the Storage Act would be invalid under the negative commerce clause analysis, it is as invalid as it would be if the District were a state.

Because one line of the District's defense is that the Twenty-first Amendment empowers it to enact this legistion even in the face of the interstate Commerce Clause, we need also determine whether the Twenty-first Amendment applies to the District. Section 2, the relevant section of the amendment, states in its entirety:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

"By interpretation of [the Supreme] Court the Amendment has been held to relieve the states of the limitations of the Commerce Clause on their powers over" the transportation or importation into the state of "intoxicating liquor." *Carter v. Virginia,* 321 U.S. 131, 137 (1944). That "relief" has over the years been held far less than absolute, but before we consider the limitations on the states' powers to regulate alcohol within their boundaries under the Twenty-first Amendment, we must first determine whether that Amendment is at all relevant to the District of Columbia, which is still not a state. Ultimately, we conclude that the District for present purposes is to be considered as if it were a state under the Twenty-first Amendment. Because our reasons for so concluding are partially subsumed within the next step of our analysis, we will proceed with that analysis on the assumption that the Twenty-first Amendment applies rather than engage in a discussion that would soon prove duplicative.

2. *The Congressional Enactment*

The District first asserts that the Storage Act is not a violation of the interstate Commerce Clause on the basis

that Congress required in-District storage under the ABC Act itself. According to the District, this would shield the Act from Commerce Clause scrutiny, as Congress, acting under the explicit power grant of that clause, obviously cannot be constrained by the implicit negative commerce clause. While this is true as a generality, there is a possible exception applicable to legislation concerning only the District of Columbia. When Congress passes legislation for the District of Columbia under the power expressly delegated to it by Article I, § 8, cl. 17 of the Constitution, "[t]o exercise exclusive Legislation in all Cases whatsoever, over [the] District," it acts "in like manner as the legislature of a State." *Gibbons v. District of Columbia,* 116 U.S. 404, 407 (1886). As such, it may choose "to exercise a *part, only,* of its powers," *Neild v. District of Columbia,* 110 F.2d 246, 251 (D.C. Cir. 1940), and limit itself thereby to those powers which would be available to a state legislature. If that is the case with the ABC Act, then arguably the interstate Commerce Clause would apply as if that Act were state legislation rather than a congressional enactment.

However, it does not necessarily follow from the fact that Congress legislates for the District that it intends to deprive itself "of the rest of its powers." *Id.* Even in legislating for the District, Congress may, if it chooses, "exercise . . . within the District, general legislative powers delegated to Congress by the Constitution." *Id.* If it has done so in the ABC Act, then there is no colorable argument that the negative commerce clause renders that Act invalid. Therefore, we will proceed to determine whether Congress in enacting that legislation intended to act as the legislature of the District, arguably bound by the negative commerce clause, or as the general legislature, plainly not so bound.

Congress enacted the ABC Act in January of 1934, in direct and express response to the repeal of Prohibition by the Twenty-first Amendment the preceding month.

That amendment by itself had worked a fundamental alteration in the balance between regulation of alcohol by the federal government and by the states. It did not, however, resolve the question as to the District of Columbia. *Cf. Norman's on the Waterfront, Inc. v. Wheatley*, 317 F. Supp. 247, 254 (D.Vi. 1970), *aff'd*, 444 F.2d 1011 (3d Cir. 1971) (noting that "[t]hrough the 21st Amendment shifted the balance of power to regulate alcoholic beverages in interstate commerce, it did not purport to alter the relationship between Congress and the territories"). Congress therefore passed the ABC Act to fill that void with respect to the District of Columbia. The apparent purpose of the Act read as a whole was to put the District in essentially the same position with reference to alcoholic beverage control as were the separate states. Thus, while it might be said that Congress was acting "in like manner as the legislature of a State," *Gibbons*, 116 U.S. at 407, we cannot say with any certainty that Congress intended to deprive itself of the full range of its powers as it was not only determining, state-like, what the regulation of alcoholic beverages should be after the end of Prohibition, but also making the Congress-like determination that the void existed and that it, exercising its plenary power under Art. I, § 8, cl. 17, should fill that gap. With respect to states, the whole range of regulation of alcoholic beverages is exercised under either the Twenty-first Amendment by the states themselves or the interstate Commerce Clause by the Congress. With regard to the District, Congress in 1934 was exercising both powers and it would make no sense to say the Congress could not regulate the interstate commerce aspect because Congress itself was the only body which could. We thus conclude that if Congress mandated the in-District limitation of the Storage Act, then the congressional mandate would not be invalidated by the negative commerce clause.

All of this however does not determine the case. Congress did not in fact mandate the storage requirement,

although some provisions of the ABC Act point to an interpretation consistent with that requirement. It is one thing to contemplate the possibility of a requirement, another to mandate it. The District argues that Congress mandated the requirement when it provided in section 13 that "[e]ach license shall particularly describe the place where the rights of the license are to be exercised. Alcoholic beverages shall not be . . . kept for sale . . . by any licensee on premises other than the premises designated on the license." D.C. Code § 25-114(e). It notes that section 11(c) of the Act also authorizes wholesalers to sell alcoholic beverages "from the place therein described." D.C. Code § 25-111(a)(3). The District's argument then couples these concepts with section 2 of the Act, D.C. Code § 25-102, which limits the territorial scope of the Act by providing that "[i]t shall apply only to the District of Columbia." However, neither these nor the similar sections further cited by the District compel the conclusion that Congress intended that a wholesaler could store only at a place within the District.

Section 2 simply makes clear that the licensing process in question did not contemplate an attempt by Congress to retake the ground removed by the Twenty-first Amendment by regulating the commerce in alcohol within or among the several states. Limiting wholesalers to described premises does not say that those premises must be in the District. It may be that Congress so contemplated, it is not clear that Congress so mandated. Indeed, it is clear that it did not. If it had, the District Council would have had no need to have amended section 13 in the way now in controversy. Nor, would the District need to be defending that Amendment. It might be said that the precise reason we are here is that Congress did not mandate storage only within the District.

As Kronheim notes, the District itself construed the ABC Act as allowing out-of-District storage before the passage of the Storage Act, and even then grandfathered

existing nonconforming warehouses. That is obviously inconsistent with its argument for congressional mandate. Kronheim can also argue credibly that section 24 of the Act, captioned "Licensees Doing Business Outside of the District," compels its interpretation that wholesalers may store their beverages outside the District. But that section can equally be read as suggesting only that it is permissible under the Act for a District-licensed manufacturer and in limited circumstances a District-licensed wholesaler to do business outside the District. Because the ABC Act neither mandates nor forbids the storage limitation, we face the question left open by our unpublished resolution of *Quality Brands*: that is, does the Storage Act violate the negative commerce clause?

3. The Storage Act

Because we have determined that the local warehousing requirement of the Storage Act is a creature of the enactment by the District of Columbia Council and not the Congress, we must determine if it violates the Commerce Clause. In making this determination, we must at last consider whether the District of Columbia is treated as a state for purposes of the Twenty-first Amendment and, if so, what effect section 2 of that Amendment has on the Commerce Clause implications for the Storage Act. One-half of the equation is simple. That is, we will treat the District of Columbia as a state for purposes of Twenty-first Amendment analysis. As noted above, Congress determined at the time of the passage of the ABC Act in response to the repeal of Prohibition in the Twenty-first Amendment that the District would function in a state-like manner for alcohol regulation purposes. We have no warrant to interfere with Congress's plenary power under Art. I, § 8, cl. 17, "[t]o exercise exclusive Legislation in all Cases whatsoever, over [the] District." Thus, when the District Council, acting under its delegated legislative authority, amended the Code, its act was subject to the Commerce Clause, as affected by the inter-

play between that Clause and the Twenty-first Amendment.

The first step in analyzing whether a state law unjustifiably discriminates or burdens interstate commerce under the "negative" commerce clause is to

> determine whether it "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." *Hughes* [*v. Oklahoma*, 441 U.S. 322, 336 (1979).] . . . If a restriction on commerce is discriminatory, it is virtually *per se* invalid. By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

Oregon Waste Systems, 114 S. Ct. at 1350 (citations omitted).

The District argues that the local warehousing requirement does not impermissibly burden interstate commerce. First, it contends that the requirement does not favor District manufacturers over out-of-state manufacturers as all alcoholic beverages sold in the District are manufactured outside the District, and, even if alcoholic beverages were produced in the District, they would be subject to the same requirement. Second, the District argues that the requirement does not discriminate against out-of-state labor, noting that the ABC Act and the Storage Act do not impose a residency requirement upon workers at storage facilities. And third, the District claims that the requirement does not favor District wholesalers over out-of-state wholesalers as the Acts apply only to wholesalers licensed by the District.

Kronheim contends that the storage requirement discriminates against interstate commerce in warehouse facilities and storage space. It argues: "In essence, the Storage Act is a discriminatory local content and proces-

sing requirement, which requires alcoholic beverage wholesalers to acquire and maintain . . . [an] element[] of production—commercial real estate—within the boundaries of the District." We agree with the appellee and find the local warehousing requirement is patently discriminatory. The requirement not only deprives out-of-state businesses access to a local market, *C & A Carbone, Inc. v. Clarkstown, N.Y.*, 114 S. Ct. 1677, 1681 (1994), but also requires business operations be performed in the District even if they could be performed more efficiently elsewhere. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970).

In this aspect, our analysis of the Storage Act is similar to the Supreme Court's consideration of an ordinance of a New York municipality requiring specified local handling of solid waste which had the effect of depriving out-of-state businesses of a local market by preventing them from performing an initial processing step reserved for a favored local operator. Though the town argued that the ordinance was not discriminatory because it did not differentiate among items of solid waste on the basis of geographic origin, the Court disagreed, noting that "the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it." *C & A Carbone, Inc.*, 114 S. Ct. at 1682. As appellee notes, the article of commerce at issue here is not so much the sale of alcoholic beverages, but rather, the service of storing the beverages. Regarding this stream of commerce, the Storage Act discriminates as it allows only wholesalers who store their beverages within the District to sell their product. In *Carbone*, the Court struck down the solid waste ordinance holding that "[i]n this light, the . . . ordinance is just one more instance of local processing requirements that [the Court] long ha[s] held invalid." *Id.* The same reasoning applies here, and we hold that the Storage Act is facially discriminatory.

Because the statute is facially discriminatory, Commerce Clause jurisprudence, ignoring for the moment the

effects of the Twenty-first Amendment, would dictate that we should invalidate the statute unless the District can show that the local warehousing requirement "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988); *see also Oregon Waste Systems*, 114 S. Ct. at 1351. This inquiry requires the strictest scrutiny. *Hughes*, 441 U.S. at 337. Appellant advances two such purposes. First, the District contends that the storage requirement serves important inspection and enforcement interests, noting that the District's power to enforce its alcoholic beverage laws is limited to premises within its borders. Second, the District argues that the storage requirement is integral to both maintaining its "three-tier system of distribution," which strictly separates the functions of supplier, wholesaler and retailer, and discouraging creation of a "tied house," in which one firm controls the entire chain of distribution.

Appellee contests both of these putative regulatory interests. First, appellee argues that the local warehousing requirement does not serve inspection or enforcement interests as the District has never inspected any wholesaler's warehouse or goods prior to distribution to retailers, nor has the District explained why inspections could not occur at a warehouse outside the District. Second, appellant contends that the District makes "little effort to maintain a three-tier level of distribution," noting that even if the District did have such an interest it could be equally served in other nondiscriminatory ways. The district court ruled with appellee, relying on the collateral estoppel worked by *Quality Brands*. Because we have ruled that we are not so estopped, we will examine the question anew.

The court in *Quality Brands*, applying strict scrutiny, found that appellant's justifications did not survive scrutiny under the Supreme Court's final test from *Hughes:*

that is, "whether non-discriminatory alternatives exist to serve the local purpose." *Quality Brands*, 715 F. Supp. at 1142. In reaching that conclusion, the *Quality Brands* court examined the history of the adoption of the local warehousing requirement, noting that at the time of the Council's vote on the amendment, the general counsel raised the question of the Act's constitutionality, alerting the board to the negative commerce clause implications of protectionist legislation. *Id.* at 1141. A member of the Council suggested "several putatively legitimate state interests which would be promoted by requiring geographic proximity of warehouses, *e.g.*, auditing company records, monitoring compliance with the ABC laws, monitoring licenses, checking tax forms for audits," and similar enforcement goals. *Id.* The *Quality Brands* court rejected the enforcement rationales along with the three-tier licensing system as not established under the lack of non-discriminatory alternatives test. If this regulation dealt with any industry not governed by the Twenty-first Amendment—that is, any industry except alcoholic beverages—we might well be inclined to agree. However, in the case of alcohol, the problem is a more difficult one. Because it is alcohol that the Storage Act regulates, the Twenty-first Amendment does apply, and we must extend our analysis.

As we noted above, "[b]y interpretation of [the Supreme] Court the Amendment has been held to relieve the states of the limitations of the Commerce Clause on their powers over" the transportation or importation into the state of "intoxicating liquor." *Carter v. Virginia*, 321 U.S. 131, 137 (1944). As we further noted, however, that relief has in more recent years been held far less than absolute. The more recent case *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), is a more current authoritative delineation of the relationship between the Commerce Clause and the Twenty-first Amendment. In *Bacchus*, the Supreme Court considered an Hawaiian statute which imposed an excise tax on liquors sold at wholesale but pro-

vided exemptions from that tax for certain locally produced alcoholic beverages. The Court, noting that "[t]he legislature's reason for exempting" the local liquors was to "promote the establishment of a new industry" and "to help' in stimulating" a local industry. 468 U.S. at 270 (quoting *In re Bacchus Imports, Ltd.*, 65 Haw. 566, 573-74, 656 P.2d 724, 730 (1982)).

The Supreme Court held that this protectionist legislation "violated the Commerce Clause because it had both the purpose and effect of discriminating in favor of local products." *Bacchus,* 468 U.S. at 273. The state of Hawaii argued that the Twenty-first Amendment saved the tax exemption from the fate it would have endured under "ordinary Commerce Clause principles." *Id.* at 274. The Court rejected that argument, noting that "[t]he central purpose" of the Twenty-first Amendment "was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.* at 276. Because Hawaii's justification for its tax structure discriminating against interstate commerce was the promotion of local industry, the statute before the Court "constitute[d] mere economic protectionism" and was "therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.*

Kronheim may colorably and even credibly argue that the District's local warehousing requirement is protectionist. Indeed, we cannot say with any assuredness that protectionism is not a purpose of the legislation. Nonetheless, the Storage Act both by its terms and according to its history is designed to advance the core enforcement purposes protected by section 2 of the Twenty-first Amendment. In this case then, the legislative body operated with a mixed motive.

While under *Bacchus* and other Supreme Court decisions, *e.g., 324 Liquor Corp. v. Duffy,* 479 U.S. 335 (1987), the Supreme Court has been consistently emphasizing limitations on the Twenty-first Amendment

power of the states, the nonprotectionist side of the District's mixed motive places section 2 squarely within the Amendments' ambit. Thus, unlike the Hawaiian statute, it was "enacted to combat the perceived evils of an unrestricted traffic in liquor," as set out in the councilman's statement analyzed by the *Quality Brands* court. The *Bacchus* decision struck down the Hawaiian statute "because the tax violates a central tenet of the Commerce Clause but is not supported by any clear concern of the Twenty-first Amendment." *Bacchus,* 468 U.S. at 276. The Supreme Court has long recognized that the Amendment "created an exception to the normal operation of the Commerce Clause," *Craig v. Boren,* 429 U.S. 190, 206 (1976), and that the resultant authority of the state under the Amendment over importation of intoxicants "is transparently clear." *Id.* at 207. The Court has also concluded that the state's authority under the Amendment includes the "plenary power to regulate and control . . . the distribution, use, or consumption of intoxicants within her territory after they have been imported." *Department of Revenue v. James B. Beam Distilling Co.,* 377 U.S. 341, 346 (1963). Nothing in *Bacchus* or the other later cases overrules the principles iterated in the *Boren* and *Beam* cases. Despite the mixing with the tainted motive of protectionism, D.C.'s claimed motives of "legitimate state interests which would be promoted by requiring geographic proximity of warehouses, *e.g.,* auditing company records, monitoring compliance with the ABC laws, monitoring licenses, checking tax forms for audits, etc.," *Quality Brands,* 715 F. Supp. at 1141, falls squarely within the state's core enforcement powers over alcohol.

Eloquently testifying to the legitimacy of the District's claims, as well as to the potentially dire consequences of the precedent we might establish by striking the Act, are an array of state statutes subject to potential attack on the same Commerce Clause basis. *See, e.g.,* Ark. Code § 3-5-216(a) (1987) ("[L]ight wines or beer . . . may be received and kept in storage at a distributor's place of

business in this state"); Cal. Bus. & Prof. Code § 23355.1 (a) (1992) ("Deliveries of distilled spirits by a licensee to a retail licensee may be made from the vendor's licensed premises or from a warehouse located within the county in which the vendor's licensed premises are located . . ."); Colo. Rev. Stat. § 12-47-115(1)(a)(I), (b)(I), (c.5) (1985 Rep. Vol.) ("A wholesaler's liquor license shall be issued . . . for the following purposes only: (I) To maintain and operate two warehouses and one sales room in this state . . ."); Del. Code tit. 4, § 501(f) (1993) ("No person may import into this State any alcoholic liquor unless it is delivered directly to a licensed warehouse or warehouses in Delaware . . . and is unloaded and physically stored in said warehouse or warehouses."); Fla. Stat. § 561.54 (1987) ("It is unlawful . . . to make delivery from without the state of any alcoholic beverage to any person . . . within this state, except . . . qualified bonded warehouses in this state"); N.J. Rev. Stat. § 33:1-11 (1993) ("[T]he delivery of such alcoholic beverages by the holder of [a plenary wholesaler's] license to retailers . . . shall be from inventory in a warehouse located in New Jersey which is operated under a plenary wholesale license."); Minn. Stat. § 340A.305 (1994) ("All licensed wholesalers must own or lease warehouse space within the state and must have adequate delivery facilities to perform the function of a wholesaler. . . . [A]lcoholic beverages manufactured outside the state . . . must be unloaded into the wholesaler's warehouse located in this state. Licensed wholesalers may distribute alcoholic beverages only from the warehouse"); Okla. Stat. Ann. tit. 37, § 521.E (1995) ("A wholesaler license shall authorize the holder thereof to operate a single bonded warehouse with a single central office together with delivery facilities at a location in this state only at the principal place of business for which the wholesaler license was granted."); S.D. Compiled Laws Anno. § 35-4-45 (1992) ("Any bonded warehouse with South Dakota may, upon compliance with the provisions of this section, receive alcoholic beverages for storage purposes").

We therefore conclude that although the Act facially violates the negative commerce clause, it is supported by a clear concern for the core enforcement function of the Twenty-first Amendment, and we therefore reverse the district court's decision declaring the statute unconstitutional.

III. Conclusion

For the reasons set forth above, we conclude that the local warehousing requirement of the Storage Act is constitutional. The decision of the district court is reversed.

SILBERMAN, *Circuit Judge, concurring*: I concur, but write separately to explain the effect, as I see it, of our prior decision in *Quality Brands, Inc. v. Barry*, 901 F.2d 1130 (D.C. Cir. 1990) (Unpublished Memorandum) (per curiam).

In *Quality Brands*, the district court determined that D.C.'s in-district warehousing requirement facially violated the Commerce Clause, that it was justified by compelling government purposes, and that given the Supreme Court's recent limitations, the Twenty First Amendment did not authorize the District's discrimination. 715 F. Supp. 1138, 1140-42 (D.D.C. 1989). D.C. appealed, and on appeal offered a new argument: that the congressional ABC Act directly imposed the in-district warehousing requirement, obviating any Commerce Clause inquiry. In an unpublished memorandum decision, we explained that

> [w]e have elected to dispose of this appeal by unpublished order primarily because the most substantial argument put forward by the appellants—an argument which, if we accepted it, would allow us to to avoid reaching any constitutional issue—was not properly raised before the district court. Under these circumstances, we think it unnecessary to discuss the several rather important and difficult questions of constitutional law involved. Instead, we affirm substantially for the reasons articulated in the opinion of the district court.

Kronheim's subsequent suit against the District raised the same issue as the *Quality Brands* suit, *i.e.*, whether the District constitutionally could require in-district warehousing. Kronheim asserted that the *Quality Brands* decision collaterally estopped D.C. from arguing the constitutional issues (although not the statutory claim). The district court agreed that D.C. was estopped since Kronheim could not easily have joined the prior suit and since estoppel was not unfair to the District. It cited our statement that

"we affirm substantially for the reasons . . . of the district court" in support of its conclusion that the District was estopped. Although the court noted the District's argument that non-mutual collateral estoppel does not apply to the government, it stated that it was unclear whether this applied to state governments or to the District and then nevertheless, without resolving this issue, proceeded to apply the analysis developed in *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 329-31 (1979), for non-governmental actors.

To be sure, our statement that "we affirm substantially for the reasons . . . of the district court" is rather confusing. But I think the fair import of our decision, read as a whole, is that we expressly refrained from deciding the constitutional questions, both Commerce Clause and Twenty First Amendment, because the District had raised a new issue on appeal; whether Congress had imposed the warehousing requirement by statute—in which case the constitutional isues would not be relevant. We did not publish in order to avoid giving our opinion precedential effect, which could only mean we wished to preserve the District's opportunity to raise the issue again. It should be understood that not establishing a precedent in these circumstances is essentially the same as not creating collateral estoppel against the District, because only the District would be the subject of a subsequent suit. Although it is possible to read our memorandum, as does appellee, as leaving open only the statutory issue, Judge Sentelle's opinion makes clear that the two are intertwined. And, it would be anomalous for us to conclusively resolve an important constitutional issue by simply stating we agree "substantially" with the district court.

Even had we decided *Quality Brands* in a published decision on the merits, it is not clear collateral estoppel would apply. Collateral estoppel is not generally available against the federal government, *U.S. v. Mendoza,* 464 U.S. 154, 159-63 (1984), and this rule may very

well apply to the states. *See Hercules Carriers, Inc. v. Florida,* 768 F.2d 1558, 1578-79 (11th Cir. 1985) (applies to states); *but see State v. United Cook Inlet Drift Assoc.,* 895 P.2d 947, 950-52 (Alaska 1995) (does not apply to Alaska). *Mendoza* held that the non-mutual offensive collateral estoppel applied in *Parklane Hosiery* did not pertain to the federal government because the government is not in the same position as a private litigant. The government litigates quantities of suits, often involving issues of public importance, and it may decide not to appeal for policy reasons or due to the constraints of limited resources. Making the first decision final freezes development of the law and forces the government to appeal every decision as a precautionary matter. *See Hercules Carriers,* 768 F.2d at 1578-79. (Of course that the District did appeal in *Quality Brands* does not affect this doctrinal reasoning). We need not decide whether the *Mendoza* doctrine applies to District litigation, however, because in my view our *Quality Brands* opinion was not designed to and did not have preclusive effect.[1]

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[1] I am also unsure whether the other requirements for non-mutual offensive collateral estoppel are met. *See Parklane Hosiery,* 439 U.S. at 329-31. For the reasons discussed above, it is not clear that the constitutional issues were actually and necessarily determined in our prior decision, since we purported not to reach them. And given our refusal to reach the issues in that appeal, it seems unfair to bind D.C. to the district court decision. It also appears possible for Kronheim to have intervened in the prior case; clearly Kronheim's ability to determine where to locate its warehouses was at stake, even if it had no plans for an immediate move.

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting:

The majority holds that the Wholesale Liquor Industry Storage Act of 1986 (Storage Act) discriminates against interstate commerce: it is "patently discriminatory" because the "[local warehousing] requirement not only deprives out-of-state businesses access to a local market but also requires business operations be performed in the District even if they could be performed more efficiently elsewhere." Majority Opinion (Maj. Op.) at 14 (citations omitted). As a result, the Storage Act violates the dormant commerce clause, and thus is unconstitutional, unless it survives strict scrutiny. The majority concludes that, regardless whether the Storage Act meets strict scrutiny, the legislation is a valid exercise of core twenty-first amendment power—because a District of Columbia (District) councilman said so. *Id.* at 202-04.

The trouble is that the District unsuccessfully litigated the dormant commerce clause and twenty-first amendment issues over six years ago. Accordingly the court below concluded that the doctrine of issue preclusion, in particular nonmutual offensive collateral estoppel, bars the District from relitigating the constitutionality of the Storage Act. In my view the district court did not err in so concluding and therefore I would not reach the merits. I respectfully dissent.

I. BACKGROUND

A. *Legislative History of the Storage Act.*

In 1979, the District's Alcoholic Beverages Control Board (Board) granted Quality Brands, Inc., a District-licensed wholesaler, permission to store its District-bound alcoholic beverages in Maryland. As a result, jobs within the jurisdiction of Local 639 of the International Brotherhood of Teamsters were lost to Maryland. Local 639 then lobbied the District's governing body, the District Council (Council), to enact legislation prohibiting wholesalers from using warehouse facilities outside the District. To that end, in 1981 a bill entitled the "Wholesale Liquor

Industry Job Protection Act" was introduced. Substantially identical bills were reintroduced in 1983 and 1985 bearing the same eyebrow-raising title.

In January 1986 the Council's Committee on Consumer and Regulatory Affairs held a hearing on the proposed legislation. The record manifests that the witnesses who testified at the hearing, including the president of Local 639, focused exclusively on the loss of jobs and tax revenue resulting from wholesalers using warehouse facilities outside the District. For example, the director of the District Department of Consumer and Regulatory Affairs testified, "The executive supports this bill because it will create and protect jobs for District of Columbia residents. This bill would also increase the tax base because current and prospective licensees would have to use facilities in the city to store their beverages." Appellee's Legislative History and Statutory Addendum (Appellees Addendum) 50. A competitor of Quality Brands testified that the authorization extended to Quality Brands put his company at a competiitve disadvantage and emphasized that it "has meant and will mean the continuing layoff of employees in Washington, as well as shrink the tax base." *Id.* at 44. The president and general counsel of the D.C. Wine & Spirits Wholesalers Association, Inc., a trade association consisting of five District-licensed wholesalers, urged passage of the bill, which the association viewed "as a *job protection act.*" *Id.* at 47 (emphasis in original). The committee report accompanying the bill described the bill as a job protection measure. *See* Appellant's Statutory and Legislative History Addendum (Appellant's Addendum) 55-57.

In short, the Storage Act (aka "Job Protection Act") was conceived and justified as an act of pure economic protectionism. No other justification was asserted. No one suggested that the local warehousing requirement would assist the District in regulating alcoholic beverages. This is not surprising: The record contains no evidence

that District officials have ever even visited a wholesaler's warehouse. And the record manifests that a wholesaler can store beverages outside the District yet comply with the Alcoholic Beverages Control Act (ABC Act), enacted by Congress in 1934, and its implementing regulations. *See* Brief of Amicus Curiae Quality Brands, Inc., Exhibit G. (admissions of District).

At any rate, the bill came before the Council as a whole during a legislative session in April 1986. A council member noted that the Council's General Counsel had expressed concern about the legality of the local warehousing requirement under the dormant commerce clause because the legislation amounted to economic protectionism. Councilman John Ray responded that the Storage Act was more than that:

> The interest that we have . . . is to audit the records of these companies, to check their warehouses to make sure that they're in compliance with the ABC laws of the District of Columbia, to make sure their licenses are posted correctly, to check each and every truck they own to make sure their licenses are posted correctly, to make sure all the lettering and numbering of these trucks are correct and in accordance with our licensing laws, to make sure that their tax forms are file [sic] so that we can audit to make sure that they're paying the proper taxes to the District of Columbia because taxes are based upon the gallons they sell per year, and all other laws which comply [sic] with the District of Columbia.

Appellant's Addendum 62.[1] The bill passed its first reading. On second reading three days later, it passed with

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[1] It is Ray's unsupported "11th-hour" statement, a statement essentially made in anticipation of litigation, on which the majority relies to conclude that the Council enacted the Storage Act " 'to combat the perceived evils of an unrestricted traffic in liquor.' " Maj. Op. at 18 (quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984)).

a "grandfather" provision exempting from the Storage Act those District-based wholesalers then operating warehouses outside the District (*i.e.*, Quality Brands). At the third and final reading of the bill an amendment was offered to remove the grandfather provision and to replace it with a provision which, in effect, gave Quality Brands a 2-year grace period before it had to find a warehouse in the District. The bill passed as amended and became law.

B. *Quality Brands' Lawsuit.*

Quality Brands filed a lawsuit in 1988 to challenge the constitutionality of the Storage Act. The district court held that the Storage Act violated the dormant commerce clause because it facially discriminated against interstate commerce and could not withstand strict scrutiny. *Quality Brands, Inc. v. Barry*, 715 F. Supp. 1138, 1139-42 (D.D.C. 1989). The court further held that the Storage Act was not designed to serve a core purpose of the twenty-first amendment. *Id.* at 1142-43. Accordingly it "ordered that enforcement of the Act is enjoined." *Id.* at 1143.

On appeal this Court affirmed the district court's judgment enjoining enforcement of the Storage Act. *Quality Brands, Inc. v. Barry*, 901 F.2d 1130 (D.C. Cir. 1990) (table); Joint Appendix (JA) 64 ("ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hearby affirmed for the reasons set forth in the accompanying memorandum."). An accompanying unpublished memorandum stated: "we affirm substantially for the reasons articulated in the opinion of the district court." *Quality Brands, Inc. v. Barry*, 901 F.2d 1130, 1990 WL 51795, at *1 (D.C. Cir.). The memorandum explained that the court declined to consider an argument the District failed to "press" in the district court, namely that the Storage Act did not violate the dormant commerce clause because

the local storage requirement in fact flowed from the congressionally-enacted ABC Act.

C. *Kronheim's Lawsuit.*

Milton S. Kronheim & Co., Inc. (Kronheim) is a District-licensed wholesaler. Kronheim has been a wholesaler in the District since 1903. Historically the company has used warehouses in the District and, indeed, in 1986 the company lobbied (through its trade association) in support of the Storage Act. A decade later, however, Kronheim, on the brink of a financial crisis, determined that it could not operate at a profit if it continued to store its inventory in the District. JA 48, 55. Kronheim proposed to consolidate, in a Maryland warehouse, its District-bound inventory with the inventory of its Maryland affiliate. With its warehouse leases in the District set to expire in early 1995, Kronheim applied in February 1995 for a preliminary injunction to enjoin the District from enforcing the Storage Act.[2] The district court granted the injunction. The court held:

> [The District is] collaterally estopped from disputing the application of Judge Revercomb's ruling in *Quality Brands* to the parallel situation of plaintiffs [sic] here: namely, (1) that the local warehousing requirement facially discriminates against the kind

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[2] According to Kronheim's complaint, the District continued to enforce the Storage Act notwithstanding the *Quality Brands* holding. JA 12. In addition, the complaint alleged that the District, through the Alcoholic Beverage Control Board, was enforcing an unwritten "come to rest" policy—requiring alcoholic beverages sold by a District-licensed wholesaler to "come to rest" in the District at least 24 hours before being sold to a retailer—in an attempt to evade our decision in *Quality Brands*. *Id.* Kronheim urged that both the District's enforcement of the Storage Act and the Board's "come to rest" policy—both requiring local storage—violated the dormant commerce clause and that *Quality Brands* precluded the District from relitigating the constitutionality of a local storage requirement.

> of interstate commerce in which plaintiff plans to engage; (2) that the articulated purposes given for the requirement cannot withstand the "strict scrutiny" accorded facially discriminatory legislation; and (3) that the Twenty-First Amendment does not validate the discrimination against the interstate commerce in which plaintiff plans to engage.

Milton S. Kronheim & Co., Inc. v. District of Columbia, 877 F. Supp. 21, 26-27 (D.D.C. 1995). The court below added that this Court's affirmance of the *Quality Brands* judgment constituted "further persuasive authority" for applying collateral estoppel. *Id.* at 27. Finally, the court below rejected on the merits the statutory issue this Court declined to consider in *Quality Brands,* to wit, whether Congress, *via* the ABC Act, prohibited District-licensed wholesalers from storing alcoholic beverages outside the District. *Id.* at 27-29.

The majority today agrees with the latter ruling, holding that the local warehousing requirement is a creature of the District, not Congress, and thus is subject to the dormant commerce clause. The majority nevertheless reverses. Over six years after our order in *Quality Brands* affirming the ruling that the Storage Act is unconstitutional, the majority now reverses field and concludes that the Storage Act is constitutional. The majority errs, I respectfully submit, in (again) passing on the constitutionality of the Storage Act because the lower court correctly concluded that the doctrine of nonmutual offensive collateral estoppel bars the District from relitigating the dormant commerce clause and the twenty-first amendment issues.

II. Nonmutual Offensive Collateral Estoppel Can Apply to the District

Before addressing why I believe the District is collaterally estopped from defending the constitutionality of the Storage Act, I must address the District's argument that

it should always be immune from the application of nonmutual offensive collateral estoppel.[3] The argument is grounded on the Supreme Court's decision in *United States v. Mendoza*, 464 U.S. 154 (1984), a due process case involving the *federal* government. The Court held that "nonmutual offensive collateral estoppel simply does not apply against the Government in such a way as to preclude relitigation of issues such as those in this case." *Id.* at 162. The Court observed that the federal government is more likely than any private party to be involved in lawsuits against different parties raising the same legal issues: the federal government litigates nationwide in multiple forums and frequently litigates legal questions of substantial public importance. *Id.* at 160. The crux of the Court's opinion is its observation that allowing nonmutual offensive collateral estoppel to be used against the federal government would have two adverse consequences. First, and most important, it "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," thereby "depriv[ing] [the] Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before [the] Court grants certiorari." *Id.* at 160. Second, "[t]he Solicitor General's policy for determining when to appeal an adverse decision would also require substantial revision" because the Solicitor General would, in effect, have "to appeal every adverse decision in order to avoid foreclosing further review." *Id.* at 160-61; *see also id.* at 163; *cf. United States v. Stauffer Chem. Co.*, 464 U.S. 165, 173 & n.6 (1984).

Mendoza's rationale is inapplicable to the District. *Cf. State v. United Cook Inlet Drift Ass'n*, 895 P.2d 947,

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[3] Nonmutual offensive collateral estoppel "occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against . . . a different party." *United States v. Mendoza*, 464 U.S. 154, 159 n.4 (1984).

950-52 (Alaska 1995) (distinguishing *Mendoza* and holding that state of Alaska is not exempt from nonmutual offensive collateral estoppel). The District does not litigate in multiple federal forums but rather in one federal circuit with one district court. Therefore, immunizing the District from nonmutual offensive collateral estoppel will not "better allow thorough development of legal doctrine by allowing litigation in multiple forums," *Mendoza*, 464 U.S. at 163, or prevent "freezing the development of the law," *id.* at 164. Moreover, compared to the Solicitor General, the District's Corporation Counsel is responsible for far less litigation and the District does not assert that its Counsel maintains, or has a compelling need to maintain, a "policy of circumspection in determining when to pursue appeals." *Stauffer Chem.*, 464 U.S. at 173 n.6.[4]

No legitimate public policy would be served by immunizing the District from nonmutual offensive collateral estoppel here. True, the District, like all government entities, does at times litigate issues of "substantial public importance." *Mendoza*, 464 U.S. at 160. But if the District receives an adverse district court decision, it can appeal to this Court, and an adverse decision by this Court will bind the District in future litigation irrespective of the applicability of nonmutual offensive collateral estoppel: principles of res judicata and estoppel will bar

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[4] The District relies on *Hercules Carriers, Inc. v. Florida*, 768 F.2d 1558 (11th Cir. 1985), where the court held "that the rationale outlined by the Supreme Court in *Mendoza* for not applying nonmutual collateral estoppel against the government is equally applicable to state governments." *Id.* at 1579. *Hercules* offered no supporting analysis but instead relied on two observations. First, *Mendoza* "did not differentiate between federal governmental interests and state governmental intersets." *Id.* Of course not; the case dealt only with the federal government. Second, *Hercules* stated that *Mendoza* contained nothing "to suggest that the concerns expressed by the Supreme Court were peculiar to the federal government." *Id.* That statement is simply incorrect. At any rate, unlike the states in the Eleventh Circuit, the District does not litigate in multiple federal district courts.

the District from relitigating the issue with the *same* party; and *stare decisis* should ordinarily preclude the District from relitigating the issue with a *different* party (this Court publishes the disposition of an issue of substantial public importance, D.C. Cir. R. 36(a), and published decisions have precedential effect, D.C. Cir. R. 28(c)). If we decline to pass on the merits of such an issue, the District can move to vacate the district court's judgment and thereby deprive it of any preclusive effect.

III. Collateral Estoppel Bars Relitigation of the Constitutional Issues

The District raises three issues in defense of the Storage Act. First, as a threshold issue, the District argues that the local warehousing requirement was imposed by Congress and thus the dormant commerce clause is inapplicable. Second, the Storage Act does not violate the dormant commerce clause because it does not discriminate against interstate commerce or, if it does, it nonetheless passes strict scrutiny. Third, irrespective of its impact on interstate commerce, the Storage Act is sanctioned by the twenty-first amendment.

The court below concluded that the threshold (statutory) issue had no merit and the majority agrees.[5] I would add that the argument is downright disingenuous. The District contends that the Storage Act "was enacted by the Council simply to make it clear" that the ABC Act, as it was enacted by Congress, prohibits wholesalers from storing alcoholic beverages outside the District." Brief of Appellant at 18. But the record belies any claim that the Council thought Congress prohibited storage outside the District. First, the committee report accompanying the bill stated that "there are no statutory restrictions" in the ABC Act regarding storage outside the District.

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[5] Kronheim does not argue that the District is collaterally estopped from raising this issue.

Appellant's Addendum 55. Councilman Ray, who authored the report, elsewhere explained to the Council that the Council could permit a wholesaler to store its inventory outside the District. *Id.* at 63, 67, 80. Second, the Council added, on second reading, a grandfather provision which would have allowed Quality Brands to continue to store its beverages in Maryland, plainly violating the purported congressional mandate. Third, the Council's General Counsel doubted the constitutionality of the bill under the dormant commerce clause, which does not apply to a congressional mandate. In short, the Council did not act on the premise that Congress mandated required local warehousing. The claim is instead a *post hoc* rationale offered to save the Storage Act, and an unpersuasive one at that.

A. *This Court's disposition in* Quality Brands *has preclusive effect.*

Once we dispose of the threshold issue we are left with the dormant commerce clause and the twenty-first amendment issues. These are the precise issues litigated and adjudicated in *Quality Brands*. The majority concedes that the constitutional issues were "actually litigated" and "actually and necessarily determined" by the district court in *Quality Brands*. Maj. Op. at 197. On appeal this Court issued an order *affirming* that judgment. The accompanying unpublished memorandum declared that the panel affirmed "substantially for the reasons articulated in the opinion of the district court," *Quality Brands*, 1990 WL 51795, at *1, an opinion which decided both the commerce clause and the twenty-first amendment issues (there were no alternative holdings). *See Quality Brands*, 715 F. Supp. at 1139-43. Our disposition in *Quality Brands* should estop the District from relitigating the constitutional issues. It is of no consequence that we did not expressly (and again) analyze the issues. *See Securities Indus. Ass'n v. Board of Governors*, 900 F.2d 360, 364-65 (D.C. Cir. 1990) ("even when an opinion is silent on

a particular issue, issue preclusion applies if resolution of that issue was necessary to the judgment"); *American Iron & Steel Inst. v. EPA*, 886 F.2d 390, 397 (D.C. Cir. 1989) (same "even in absence of *any* opinion") (emphasis in original), *cert. denied*, 497 U.S. 1003 (1990). Nor does it matter that we affirmed in an unpublished decision. D.C. Cir. R. 28(c) (unpublished decision has preclusive effect). What matters is that we affirmed the district court for the reasons the district court used.

The majority asserts that "our decision in *Quality Brands* did not necessarily involve adjudication of the issue[s] before us." Maj. Op. at 197. I do not understand how the statement can be correct. We affirmed the district court's judgment. However "murky" the language of the unpublished memorandum, *see id.* at 196, there is no dodging the fact that the only issues the district court decided in *Quality Brands* were the constitutional issues and they were the only issues we could have affirmed "substantially for the reasons" the district court gave. Indeed, because we plainly did not reverse or vacate the injunction or dismiss the appeal, we *necessarily* adjudicated the constitutional issues. *See Watts v. United States*, 402 F.2d 676, 685 (D.C. Cir. 1968) ("Collateral estoppel will prevent the relitigation of an issue that was necessary to a prior judgment or final dispositin of a case."), *rev'd on other grounds*, 394 U.S. 705 (1969). Contrary to the majority's reading, the unpublished memorandum in *Quality Brands* nowhere "expressly stated . . . that we did not *determine* the" constitutional issues. Maj. Op. at 197 (emphasis added); Concurring Opinion (Con. Op.) at 205 ("we expressly refrained from deciding the constitutional questions"). Rather, it stated that we "elected to dispose of th[e] appeal by unpublished opinion" and that we thought "it unnecessary to *discuss*" the constitutional issues but would instead "affirm substantially for the reasons articulated in the opinion of the district court." *Quality Brands*, 1990 WL 51795, at *1 (emphasis added).

The concurring opinion's deconstruction of the unpublished memorandum is not persuasive. According to the concurring opinion, "[w]e did not publish to avoid giving our opinion precedential effect, which could only mean we wished to preserve the District's opportunity to raise the [constitutional] issue again." Con. Op. at 205. Why, then, the affirmance? As I read the unpublished memorandum, *Quality Brands* affirmed the trial judge but declined to publish any discussion of the constitutional issues because, in the event the District's statutory argument had merit, a published opinion would have constituted an advisory opinion both on the dormant commerce clause and the twenty-first amendment. There is no suggestion in the unpublished memorandum that "we wished to preserve the District's opportunity to" have another crack at litigating the constitutional issues. Even if that were its unarticulated objective, the court failed in that objective because it overlooked the preclusive effect of the order affirming the lower court.

In any event, if forced to choose, why would we defer to an internally inconsistent unpublished memorandum over the unequivocal affirmance? Litigants and district judges rely on the judgments of this Court and should have confidence that our judgments mean what they say. I would not disregard our judgment and mandate in *Quality Brands*.

B. *The district court's unmodified judgment in* Quality Brands *has preclusive effect.*

Even if we ignore our affirming order and indulge the fiction that we did not adjudicate the constitutional issues in *Quality Brands*, the majority is not out of the woods. The Supreme Court has held that collateral estoppel applies "so long as the judgment in the first suit remains unmodified." *Southern Pac. R.R. Co. v. United States*, 168 U.S. 1, 49 (1897). The majority cannot deny that in *Quality Brands* we did not reverse, vacate or set aside the lower court's judgment enjoining enforcement of the

Storage Act. The district court's unmodified judgment should therefore be accorded preclusive effect. *Hubbell v. United States*, 171 U.S. 203 (1898).[6]

Yet the majority disregards the district court's judgment. Why? Because we purportedly declined to review it. But it is well established that a lower court judgment may have preclusive effect despite the lack of appellate review. *Johnson Co. v. Wharton*, 152 U.S. 252 (1894) (appellate "reexamination" not necessary); *Hubbell*, 171 U.S. at 210; *Angel v. Bullington*, 330 U.S. 183, 189-90 (1947); *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). This principle applies not only when the losing party fails to appeal an adverse judgment but also when the losing party does appeal and the appeal is dismissed without appellate review on the merits.[7]

Wight v. Montana-Dakota Util. Co., 299 F.2d 470 (9th Cir. 1962), is instructive. A decade earlier Mondakota Gas Company (Mondakota) had been sued, the district court had granted summary judgment against Mondakota on several issues and Mondakota had appealed. The Ninth Circuit dismissed the appeal without

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[6] *Hubbell* declared that the judgment of a lower court in a prior suit "operate[s] as a complete estoppel to the present suit, *unless the proceedings subsequent to the judgment in the former suit in some way deprived that judgment of its force and effect as res adjudicata.*" 171 U.S. at 207 (emphasis added). In *Hubbell* there were two "proceedings subsequent to the judgment." First, the losing party moved for a new trial which was denied. *Id.* at 209. Second, that party noticed an appeal but failed to perfect it; the appeal was not allowed. *Id.* at 210. Thus, the Supreme Court held, the lower court's prior judgment had not been deprived of its preclusive effect. *Id.* Significantly, the fact that the merits of the lower court's decision had not been reviewed by an appellate court did not dilute the preclusive effect of the judgment.

[7] The *Quality Brands* court, it bears repeating, did not discuss the appeal; it affirmed. But, as noted, I am indulging the majority's fiction that the court did not affirm. If, as the majority reasons, we did not affirm and it is plain that we did not reverse or vacate, then under the majority's logic our *Quality Brands* disposition amounts to a dismissal of the appeal.

considering the merits because Mondakota failed to timely pay the filing fee. *Mondakota Gas Co. v. Montana-Dakota Util. Co.*, 194 F.2d 705 (9th Cir. 1952) (per curiam). Thereafter, in *Parissi v. Telechron, Inc.*, 349 U.S. 46, 47 (1955) (per curiam), the Supreme Court held that the untimely payment of a filing fee did not affect the validity of the petitioner's appeal and added that it disapproved of the Ninth Circuit's decision in *Mondakota Gas*. In other words, Mondakota's appeal had been improperly dismissed. A decade later, in *Wight*, Mondakota attempted to relitigate issues identical to the ones it had lost on summary judgment in the earlier litigation and argued "that the doctrine of res judicata should not apply because that [earlier] case was never ruled on on its merits by an appellate court." *Wight*, 299 F.2d at 471. The district court rejected the argument and the Ninth Circuit affirmed, holding that "[t]he dismissal of the appeal from the judgment of the District Court . . . did not operate to prevent that judgment from becoming final and being res judicata." *Id.* at 477.

Wight relied on United States v. Munsingwear, Inc., 340 U.S. 36 (1950). In *Munsingwear*, a price fixing case, the district court ruled against the government and the government appealed. While the appeal was pending, Munsingwear moved for dismissal because an intervening event had rendered moot the issue decided by the district court. The Eighth Circuit dismissed the appeal. Thereafter the district court held that its unreviewed judgment was res judicata as to the government. The government appealed, arguing that res judicata did not apply because there had been no appellate review on the merits. The Eighth Circuit disagreed: "It is not conceivable to us that this refusal [to entertain an appeal in the prior case] had the effect of emasculating the judgment of the District Court which was appealed from, or of reserving the issue determined by that judgment for relitigation by the parties. . . ." *United States v. Munsingwear, Inc.*, 178 F.2d 204, 209 (8th Cir. 1949). The Supreme Court affirmed. The

Court rejected the government's argument that "*res judicata* should not apply" to "those who have been prevented from obtaining the review to which they are entitled." *Munsingwear*, 340 U.S. at 39. The Court held that the government should have moved to vacate the adverse district court judgment when the Eighth Circuit dismissed the appeal in the original litigation. *Id.* at 39-40.

How do these decisions bear on our case? First, even assuming we refrained from reviewing the merits of the trial judges's decision in *Quality Brands*, his judgment should be accorded preclusive effect because *it was not vacated or otherwise modified*. Second, if the District believed that we did not review the merits of the district court judgment in *Quality Brands*, it should have moved to vacate that judgment. Third, vacatur likely would have been unwarranted because the District was responsible for any lack of appellate review, *see U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 391-93 (1994): the District's failure to press the statutory argument before the trial judge is what, according to the unpublished memorandum, caused us to demur on the constitutional issues. *Cf. supra* note 6 (discussing *Hubbell v. United States*).[8]

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[8] The District's failure to make the statutory argument before the district judge in *Quality Brands* may well have been a strategic maneuver. The District does not contend that it was unaware of the argument while it was defending the Storage Act in *Quality Brands*. In fact, on appeal in *Quality Brands* the District unsuccessfully tried to convince us that it had raised the argument below. *Quality Brands*, 1990 WL 51795, at *1. Why did the District not press the argument below? It appears that Councilman Ray was of the view that the Council (but not the Board) should be able to exempt a wholesaler from any local warehousing requirement. *See* Appellant's Addendum 63, 67, 80. The Council, of course, could not exercise such power if Congress had in fact prohibited storage outside the District. Thus, it was in the Council's interest not to argue that Congress prohibited out-of-District storage but instead to seek a ruling that the District could require local warehousing without offending the Constitution.

IV. Conclusion

I believe the majority errs as a matter of fact in finding that this Court did not adjudicate in *Quality Brands* the constitutional issues raised by the District again in this litigation. Moreover, the majority errs as a matter of law in concluding that the district court's unmodified judgment in *Quality Brands* does not have preclusive effect based on our purported failure to review the decision on the merits. Finally, the majority omits to consider the consequences of not applying collateral estoppel.[9] I respectfully dissent.

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[9] The majority opinion raises a number of questions, not least among them how today's decision will affect Quality Brands, which has been operating a warehouse in Maryland (with the Board's permission) since 1979. It successfully challenged the Storage Act over six years ago (having filed for declaratory and injunctive relief on July 19, 1988) and relies on, as it is entitled to do, this Court's order affirming the injunction. It bears emphasizing that the law the majority today revives contains no grandfather provision for Quality Brands: under the terms of the Storage Act, Quality Brands had until July 27, 1988 (2 years after the effective date) to move its inventory back to the District. Appellee's Addendum 56-57; Brief of Amicus Curiae at 5.

Before today, if the District had attempted to force Quality Brands to use a warehouse in the District (*e.g.*, by threatening to revoke Quality Brands' license), the company could have moved to enforce the injunction. Res judicata plainly would have barred the District from collaterally challenging the injunction on the merits. *See Maggio v. Zeitz*, 333 U.S. 56, 68 (1948); 18 Charles Alan Wright, et al., Federal Practice & Procedure § 4433, at 307 (1981) ("Preclusion . . . prevents reexamination of the validity of a permanent injunction or similar order in subsequent contempt proceedings."); *id.* § 4414, at 117 n.21. If, after today, the District can enforce the Storage Act against Quality Brands, the majority will have allowed the District to wage a successful collateral attack on the judgment underlying the *Quality Brands* injunction. On the other hand, if Quality Brands is immune from today's decision upholding the Storage Act while Kronheim and all other wholesalers are not, the majority opinion will become a catalyst for the very inconsistency collateral estoppel is designed to prevent. *Montana v. United States*, 440 U.S. 147, 154 (1979) (collateral estoppel "fosters reliance on judicial action by minimizing the possibility of inconsistent decisions"). The majority considers none of this.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 95-0226-LFO

MILTON S. KRONHEIM & CO., INC.,
Plaintiff,

v.

DISTRICT OF COLUMBIA, *et al.*,
Defendants.

Feb. 24, 1995

MEMORANDUM

OBERDORFER, District Judge.

Plaintiff, an alcoholic beverage wholesaler licensed in the District of Columbia, seeks a preliminary injunction against defendants to prevent enforcement of a provision of the District of Columbia Wholesale Liquor Industry Storage Act of 1986 (the "Storage Act") and a "come to rest" policy, both of which require plaintiff to maintain warehouse facilities in the District of Columbia. Plaintiff argues that any local warehousing requirement violates the Commerce Clause. After an evidentiary hearing on the motion on February 10, 1995, a ruling from the bench granted plaintiff's motion for reasons there stated and to be further elaborated by a Memorandum to be filed. This is that Memorandum.

I.

Plaintiff Milton S. Kronheim & Co., Inc. is a District of Columbia corporation, licensed by the D.C. Alcoholic Beverage Control Board to do business as an alcoholic beverage wholesaler. Margolies Aff. dated January 31, 1995, at ¶ 1. Kronheim distributes alcoholic beverages to retailers in the District. Its approximately 80 suppliers are brewers, wineries, and major distillers of liquor. *Id.* ¶ 4. Kronheim also has an affiliate, The Kronheim Company, Inc., a corporation organized and existing under the laws of the state of Maryland, with its principal place of business in Baltimore, Maryland. The Kronheim Company, Inc. is a wholesale distributor of alcoholic beverages in Maryland. *Id.* ¶ 5.

Presently, Kronheim (D.C.) and Kronheim (Md.) have separate warehouse facilities. Kronheim (D.C.) leases space in two contiguous warehouses in northeast Washington, D.C. The larger warehouse, located at 2900 V Street, N.E., contains approximately 40,000 square feet of warehouse space and 17,000 square feet of office space. The warehouse has two loading docks, both of which face a narrow street. The warehouse ceiling is 18 feet high and is supported by closely spaced floor-to-ceiling pillars throughout the warehouse. Plaintiff states that 18-wheel trailers have difficulty accessing the loading docks because the docks face a narrow street and that the pillars and low ceiling render a portion of the floor space unusable. Plaintiff further asserts that the smaller warehouse, with 22,500 square feet of floor space, has similar problems. Kronheim's leases on the two warehouses expire on March 31, 1995 and February 28, 1995 respectively.

Until January 31, 1995, Kronheim (D.C.) leased a third warehouse at 2920 V Street, N.E., with approximately 20,000 square feet of floor space. The lessor sold the warehouse, and the new owner took possession of it

for its own use upon the expiration of the lease on January 31, 1995. *Id.* ¶ 6.

Kronheim (D.C.) wishes to consolidate its warehousing with its Maryland affiliate. Kronheim asserts that in order to consolidate the two firms' warehousing into a single storage facility, it needs 200,000 square feet of warehouse storage space, of which 10-20% must be refrigerated storage, with an adjoining 20,000 to 40,000 square feet of office space. It further seeks a warehouse with 24-foot-high clear ceilings, at least eight truck loading bays, adequate parking for its office and warehouse personnel, and a location near the center of the combined area served by both Kronheim (D.C.) and Kronheim (Md.) with ready access to I-95 and other major transportation arteries. Larson Aff. ¶ 5.

Kronheim (D.C.) projects that it will lose money in 1995 unless it is able to reduce costs or increase revenues. Margolies Aff. dated January 31, 1995, at ¶ 14. It asserts that due to the nature of the alcoholic beverage wholesale industry, it may go out of business permanently unless it restores itself to profitability, and that the only way to restore itself to profitability is to consolidate its D.C. warehouses with those of its Maryland affiliate. *Id.* ¶¶ 8-13, 15-18.

To this end, plaintiff seeks to acquire a warehouse in Jessup, Maryland. The Jessup warehouse purportedly has enough space for consolidated operations, sufficiently high ceilings, few support pillars, and loading docks with an access area that can accommodate 18-wheel trailers. Plaintiff asserts that the Jessup warehouse's combination of features (location, size, space configuration, features and access) makes it unique in the Washington-Baltimore area. *Id.* ¶¶ 22-23. Plaintiff claims that if it is unable to move to the Jessup facility, it will be forced to go out of business. *Id.* ¶ 31; Mollerick Aff. ¶ 10.

Plaintiff has a "handshake" agreement to purchase the Jessup warehouse, and the present owner tendered a written contract on January 27, 1995. Margolies Aff. dated January 31, 1995, at ¶ 24. Plaintiff has introduced uncontradicted evidence that the seller must close the transaction involving the Jessup facility on or before March 14, 1995, and that due to the complexity of the transaction, it must sign the purchase contracts "in the next few days . . . or the seller will sell the Jessup facility to another buyer." Margolies Aff. dated February 10, 1995, at ¶ 8.

If plaintiff were to move its warehousing operations to the Jessup, Maryland facility, it would remain a District of Columbia corporation, and it asserts that the efficiencies from consolidation with its Maryland affiliate may lead to greater revenues, resulting in more corporate income tax to the District. Approximately ninety percent of the total taxes plaintiff pays to the District are excise taxes imposed upon the sale of alcoholic beverages to District retailers and would be unaffected by the location of Kronheim's warehouse. Twenty-two of Kronheim's 84 employees are District residents and pay income tax to the District. Plaintiff predicts that its license fees and the sales tax it remits would remain constant. Because Kronheim presently leases warehouse space in the District, its landlords are responsible for related property tax irrespective of whether plaintiff remains their tenant. Mollerick Aff. ¶ 9.

On September 28, 1993, the Board granted an exemption from the local warehousing requirement to American Potomac Distributing Company, a liquor wholesaler and competitor of Kronheim. The Board granted that exemption after a preliminary hearing on March 10, 1993 and a factfinding hearing on August 19, 1993. Furthermore, the Board granted the exemption "temporarily . . . for the period of [American Potomac's] current license (1993-1995)." Pl. Exh. 2. There is no evidence that the Board has granted any exemptions since then.

II.

Plaintiff must satisfy a four-part test to secure a preliminary injunction. It must demonstrate a substantial likelihood of success on the merits; immediate and irreparable injury absent relief; that the threatened harm to it substantially outweighs any harm that an injunction might pose to defendants and third parties; and that the injunction it seeks will serve the public interest. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir.1977).

A.

In January, 1934, *Congress* passed the District of Columbia Alcoholic Beverage Control Act (the "ABC Act"), ch. 4, 48 Stat. 319 (1934). The ABC Act, enacted less than two months after ratification of the Twenty-first Amendment abolishing prohibition, established the District's regulatory structure for liquor and created the District of Columbia Alcoholic Beverage Control Board. The ABC Act was codified in title 25 of the District of Columbia Code. In 1987, the *District of Columbia Council* promulgated the Wholesale Liquor Industry Storage Act, which amended section 114(f) of title 25 of the D.C.Code by adding, in relevant part, the following: "[n]o licensee may store beverages upon premises outside the District. . . ." D.C.Code § 25-114(f).

The Board also purports to require that any alcoholic beverage sold by a District wholesaler to a District retail customer must "come to rest" in the District for at least 24 hours prior to sale. The uncontradicted evidence is that the rule is informal and unwritten, but that the Board enforces it. Berenson Aff. ¶ 4. Plaintiff seeks an injunction against enforcement of this portion of the D.C. Code and the "come to rest" rule.

B.

In 1988, Quality Brands Inc., a licensed alcoholic beverage wholesaler in the District and a competitor of plaintiff Kronheim, sought a declaratory judgment in this Court that the local warehousing requirement enacted by the D.C. Council in the D.C. Wholesale Liquor Industry Storage Act was unconstitutional. *Quality Brands, Inc. v. Barry,* Civ. No. 88-1999. On cross-motions for summary judgment, Judge George Revercomb held that (1) the local warehousing requirement facially discriminates against interstate commerce, *Quality Brands v. Barry,* 715 F.Supp. 1138, 1140 (D.D.C.1989); (2) the articulated purposes given for the requirement cannot withstand the "strict scrutiny" accorded facially discriminatory legislation, *id.* at 1140-42; and (3) the Twenty-First Amendment does not authorize the District to discriminate against interstate commerce protected by the Commerce Clause. *Id.* at 1142-43. Consequently, Judge Revercomb found that the local warehousing requirement embodied in the Act violated the Commerce Clause, and he enjoined its enforcement.

The Court of Appeals affirmed the *Quality Brands* decision without a published opinion, 901 F.2d 1130 (D.C.Cir.1990). In relevant part, its unpublished Memorandum stated:

> We have elected to dispose of this appeal by unpublished order primarily because the most substantial argument put forward by the appellants—an argument which, if we accepted it, would allow us to avoid reaching any constitutional issues—was not properly raised before the district court. Under those circumstances, we think it unnecessary to discuss the several rather important and difficult questions of constitutional law involved. Instead, we affirm substantially for the reasons articulated in the opinion of the district court. . . .

> Before this court, *the appellants urge that the District of Columbia's Wholesale Liquor Industry Storage Act of 1986 was really only an enforcement of the congressionally enacted District of Columbia Alcoholic Beverage Control Act of 1934. That is, within-the-District storage for all District licensed wholesalers was mandated by Congress' 1934 Act (and the 1935 amendments thereto) which is, of course, not subject to scrutiny under the Commerce Clause. . . .*
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> . . . . .
>
> [A]ppellants urge us to address the issue even though it was not raised below. . . . [W]e generally disapprove of that practice and will do so only in exceptional cirumstances, where injustice might otherwise result. . . . [T]here are no exceptional circumstances in this case which would justify such an extraordinary step. . . . (emphasis added)

C.

Plaintiff argues that *Quality Brands* precludes any contention by defendants that the local warehousing requirement is constitutional. First, plaintiff argues that the principle of *res judicata* prevents relitigation of the constitutionality of the requirement. Second, plaintiff argues that even if *res judicata* does not apply, defendants are collaterally estopped from raising the issues decided against them by Judge Revercomb in *Quality Brands.*

"Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the *same parties* or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of *issues* actually litigated and necessary to the outcome of the first action." *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 649 n. 5, 58 L.Ed.2d 552 (1979) (emphasis added).

Res judicata is only applicable when the second suit involves the same parties. Accordingly, *res judicata* is inapplicable to the instant case for the simple reason that plaintiff was not a party (nor in privity with a party) to the first action.

In contrast, collateral estoppel is available to a nonparty to the original suit. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). In particular, the Supreme Court has permitted *offensive* collateral estoppel by a nonparty to the original suit, i.e., where "a plaintiff is seeking to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff." *Id.* at 329, 99 S.Ct. at 650. Plaintiff argues that *Parklane Hosiery* precludes defendants from relitigating any of the issues decided in *Quality Brands.*

Defendant responds that offensive collateral estoppel is inapplicable against the government, citing *United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984). In *Mendoza*, the Supreme Court held "that *Parklane Hosiery's* approval of nonmutual offensive collateral estoppel is not to be extended to the *United States*." *Id.* at 158, 104 S.Ct. at 571 (emphasis added). The Court left unclear whether the *Mendoza*–holding applied to state or municipal governments. The lower courts are split on the question. *Compare e.g., Hercules Carriers, Inc. v. Claimant State of Florida*, 768 F.2d 1558, 1579 (11th Cir.1985) (holding *Mendoza* applicable to Florida) *with State v. United Cook Inlet Drift Assoc.*, 868 P.2d 913, 917 (Alaska 1994) (holding *Mendoza* inapplicable to Alaska). Neither party has cited, and my research has not uncovered, any case on the applicability of *Mendoza* to the District of Columbia.

The applicability of offensive collateral estoppel generally depends upon two factors in a particular case: the promotion of judicial economy, and the unfairness to defendant. *Parklane Hosiery*, 439 U.S. at 329-30, 99

S.Ct. at 650-51. First, if the plaintiff in the second action, in this case Kronheim (D.C.), had an opportunity to join the first action, but adopted a " 'wait and see' attitude, in the hope that the first action by another plaintiff [would] result in a favorable judgment[, then] offensive use of collateral estoppel [would] likely *increase* rather than decrease the total amount of litigation, since potential plaintiffs [would] have everything to gain and nothing to lose by not intervening in the first action." *Id.* at 330, 99 S.Ct. at 651 (emphasis added) (internal citations omitted). The *Parklane Hosiery* Court wished to discourage an increase in litigation, and hence, held that offensive collateral estoppel would be inappropriate if the plaintiff in the second action had an opportunity to join the first action. Defendants make no claim that plaintiff could have joined the first action. At the time of the *Quality Brands* decision, there was no threat to plaintiff, and hence, plaintiff had no reason to join litigation that was designed to benefit one of its competitors.

Second, "[i]f a defendant in the first action is sued for small or nominal damages, [or] if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant[, or] if the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result," then offensive collateral estoppel could work an unfairness to defendant. *Id.* at 330-31, 99 S.Ct. at 651. In the instant case, for aught that appears, defendants had a full and fair opportunity to litigate the question in *Quality Brands.* The instant action offers defendants no procedural opportunities that were unavailable to them during the first action. Furthermore, the litigation in *Quality Brands* involved stakes similar to the present litigation. In fact, the stakes in that case were sufficiently high for defendants to appeal the adverse judgment. Finally, defendants have pointed to no other decision inconsistent with *Quality Brands.*

Accordingly, defendants are collaterally estopped from disputing the application of Judge Revercomb's ruling in *Quality Brands* to the parallel situation of plaintiffs here: namely, (1) that the local warehousing requirement facially discriminates against the kind of interstate commerce in which plaintiff plans to engage; (2) that the articulated purposes given for the requirement cannot withstand the "strict scrutiny" accorded facially discriminatory legislation; and (3) that the Twenty-First Amendment does not validate the discrimination against the interstate commerce in which plaintiff plans to engage.

Furthermore, the Court of Appeals affirmed Judge Revercomb's decision in *Quality Brands,* 901 F.2d 1130 (D.C.Cir.1990), albeit in an unpublished memorandum, ". . . substantially for the reasons articulated in the opinion of the district court." Thus, even if defendants were not collaterally estopped from raising the same issues decided by Judge Revercomb, the Court of Appeals' affirmance of *Quality Brands* would constitute further persuasive authority.

D.

There remains the issue left unanswered by the Court of Appeals' decision in *Quality Brands* as to whether: (1) the ABC Act, passed by Congress in 1934, authorized the local warehousing requirement; (2) the Storage Act, passed by the D.C. Council in 1987, simply clarified that requirement; and (3) the local warehousing requirement is constitutional since federal statutes are not subject to the restrictions of the "negative" Commerce Clause.

The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . ." Art. I, § 8, cl. 3. The so-called "dormant" or "negative" Commerce Clause "directly limits the power of the States to discriminate against interstate commerce." *Wyoming v. Oklahoma,* 502 U.S. 437, 453, 112 S.Ct. 789, 800, 117 L.Ed.2d 1 (1992) (citations omitted).

The "conventional Commerce Clause analysis [applies] to laws passed by the D.C. government." *Quality Brands*, 715 F.Supp. at 1139. *See also Electrolert Corp. v. Barry*, 737 F.2d 110, 112-13 (D.C.Cir.1990) (applying conventional Commerce Clause analysis to District ordinance). Nonetheless, the "dormant" Commerce Clause does not apply to federal statutes; "Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid." *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986). However, it is well established that "because of the important role the Commerce Clause plays in protecting the free flow of interstate trade, [the Supreme Court] has exempted state statutes from the implied limitations of the Clause *only when the congressional direction to do so has been unmistakably clear.*" *Maine v. Taylor*, 477 U.S. 131, 138-39, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986) (emphasis added) (internal citations omitted). *See also Wyoming v. Oklahoma*, 502 U.S. at 458, 112 S.Ct. at 802 ("Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve" violation of dormant Commerce Clause); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960, 102 S.Ct. 3456, 3466, 73 L.Ed.2d 1254 (1982).

Plaintiff argues that to create a Commerce Clause exemption, a congressional delegation of regulatory power to the *District of Columbia* requires the same explicit congressional directive as an authorization to the states, citing *Stoutenburgh v. Hennick*, 129 U.S. 141, 9 S.Ct. 256, 32 L.Ed. 637 (1889). *Stoutenburgh* involved the question of whether Congress had authorized a District statute requiring commercial agents to obtain a license. On February 21, 1871, Congress promulgated "[a]n act to provide a government for the District of Columbia." On August 23, 1871, the then legislative assembly of the District of Columbia passed an act that required all commercial agents, as well as others engaged in a trade, business or profession, to obtain a license. The commercial

agents' license cost $200 annually. In 1873, 1876 and 1887 respectively, Congress passed three laws, repealing various parts of the District's license laws, but leaving the commercial agents' license requirement intact. The Supreme Court found the license requirement to be an unconstitutional "regulation of interstate commerce, so far as applicable to persons soliciting, as Hennick was, the sale of goods on behalf of individuals or firms doing business outside the District." *Id.* at 148, 9 S.Ct. at 258. In finding for Hennick, the Court rejected Stoutenburgh's arguments that "this legislation, being that of a duly authorized agent of Congress, is that of Congress itself," and that "even if that were not so, Congress has adopted it in the several acts of" 1873, 1876, and 1887. *Id.* at 145. The Court stated: "the failure of Congress to make *express* regulations is equivalent to indicating its will that the subject shall be left free." *Id.* at 148, 9 S.Ct. at 258 (emphasis added). Accordingly, plaintiff argues that since the ABC Act does not contain any *unambiguous* or *explicit* language requiring local warehousing, defendants' congressional authorization argument must fail.

Defendants frame the question differently. Rather than arguing that the ABC Act explicitly intended to prohibit a licensed wholesaler from storing its alcoholic beverages outside of the District, they argue that the ABC Act did not authorize the Board to permit wholesalers to store alcoholic beverages outside the District. Defendants note that in expounding a statute, a court "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its objects and policy." *Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41, 51, 107 S.Ct. 1549, 1555, 95 L.Ed.2d 39 (1987) (citations omitted). Defendants argue that, viewed as a whole, the ABC Act presumes that wholesalers store their alcoholic beverages in the District, and they cite to a number of provisions in the ABC Act to buttress this argument.

Even assuming the statute as a whole presumes that licensed wholesalers warehouse in the District, defendants have failed to identify any section of the 1934 ABC Act (i.e. the statute passed by Congress) which unambiguously gives the Council (or the Board) the authority to *prevent* a licensed wholesaler from storing its liquor outside the District. The ABC Act's failure to *authorize* (or its failure to authorize the Board to permit) warehousing outside the District is irrelevant. While the assumption underlying some sections of the ABC Act may be that a licensed wholesaler must store its goods in the District, no section "explicitly and unambiguously" requires the wholesaler to do so. *See supra* pp. 27-28.

Furthermore, defendants' own argument is undercut by a section of the 1934 ABC Act that contemplated the existence of a licensed wholesaler doing business outside the District. Section 24 of the ABC Act was referred to at the margin of the Statutes at Large volume as "Licensees doing business outside of the District." District of Columbia Alcoholic Beverage Control Act, ch. 4, 48 Stat. 319, 332 (1934). It stated, in relevant part:

> No person holding a wholesaler's or retailer's license shall purchase any beverage, except beer or tax-free wines, from any manufacturer or *wholesaler doing business outside of the District of Columbia and not holding a license issued under the provisions of this Act*, unless such wholesaler or retailer has delivered to the Board a memorandum of the order for such beverages, in duplicate, on a form to be prescribed by the Board . . . (emphasis added)

Thus, section 24 required a District-licensed retailer to deliver to the Board a memorandum of its order purchasing alcoholic beverages from a wholesaler who *both* "do[es] business outside of the District" *and* does "not hold[] a license issued under the provisions of the Act." The natural implication is that a District-licensed retailer need not deliver to the Board such a memorandum in

order to purchase alcoholic beverages from a wholesaler who does business outside of the District and *does* hold a license issued under the provisions of the Act. It follows then that it must be possible for a wholesaler who does business outside of the District to hold a license issued under the provisions of the Act. While section 24 does not explicitly authorize a licensed wholesaler to *warehouse* its liquor outside of the District, its clear contemplation of a licensed wholesaler *doing business* outside of the District refutes the implication of defendants' argument that the ABC Act required wholesalers to do all their business in the District.

Accordingly, it is likely that plaintiff will prevail on its argument that application of the local warehousing requirement embodied in the District of Columbia Wholesale Liquor Industry Storage Act to prevent plaintiffs from warehousing their product in Maryland would violate the Commerce Clause.

E.

Furthermore, the unwritten "come to rest" policy is also likely to be found unconstitutional as applied to plaintiff. Any attempt or threat by defendants to enforce the "come to rest" policy to prevent plaintiff from warehousing its liquor at the Jessup, Maryland facility would have the same constitutional infirmity as the local warehousing requirement embodied in the Wholesale Liquor Industry Storage Act.

In any case, even if the rule were not unconstitutional, defendants have not refuted plaintiff's suggestion that the rule is *ultra vires*, and plaintiff has reserved the right to contest the Board's authority to impose or enforce the rule.

F.

Although defendant did not raise the issue, I have considered *sua sponte* whether plaintiff should have sought an exemption from the Board as a predicate to filing this

suit. I conclude that it would have been futile; the Board could not have afforded adequate relief in the window of opportunity available to plaintiffs to acquire the Jessup property.

Plaintiff has demonstrated that it must close on the opportunity to buy the Jessup property more or less immediately or it will go to a competing purchaser. Since it took the board nearly seven months from the preliminary hearing (and presumably even longer from the original application) to grant the most recent request for an exemption, an application from plaintiff would have been futile. In any case, defendants' position is that the statute does not permit out-of-District warehousing at all, and hence, that the Board does not have the authority to grant exemptions. Thus, even in defendants' view, an application to the Board would have been futile.

Furthermore, plaintiff brought this action under 42 U.S.C. § 1983. Section 1983 does not ordinarily require "exhaustion of state judicial or administrative remedies [because of] the paramount role Congress has assigned to the federal courts to protect constitutional rights." *Steffel v. Thompson,* 415 U.S. 452, 472-73, 94 S.Ct. 1209, 1222-23, 39 L.Ed.2d 505 (1974).

Accordingly, plaintiff has demonstrated a substantial likelihood of success on the merits.

III.

The balance of equities heavily favors plaintiff. Plaintiff asserts, without refutation from defendants, that "[i]f the transaction does not go forward immediately, the property will likely be sold to a competitor of Kronheim's who operates businesses in both D.C. and Maryland." Margolies Aff dated January 31, 1995, at ¶ 24. Plaintiff has further asserted that due to the nature of the alcoholic beverage wholesale industry, it may go out of business unless it restores itself to profitability, and that purchase

of the Jessup facility is the only way to restore itself to profitability. It has also asserted that if it goes out of business, it will be "invariably unable to reopen [its] business." Id. ¶¶ 8-13, 15-18.

The ultimate resolution of this case, particularly given the complex constitutional questions involved, could take weeks or longer, at which point plaintiff would have lost its opportunity to purchase the Jessup warehouse. Thus, plaintiff has shown that absent preliminary injunctive relief, it would suffer immediate injury. Furthermore, "[f]rom the earliest times, courts in equity have considered an injury to real property to be irremediable at law. The uniqueness of land typically makes damages an inadequate remedy." *Ramirez de Arellano v. Weinberger,* 745 F.2d 1500, 1527 (D.C.Cir.1984) (footnote omitted), *vacated on other grounds,* 471 U.S. 1113, 105 S.Ct. 2353, 86 L.Ed.2d 255 (1985). Thus, if plaintiff were unable to purchase the Jessup property, the injury to plaintiff would be irremediable.

The harm to defendants or any third parties of temporarily enjoining the enforcement of an unconstitutional statute and policy is minimal. Defendants argue that granting the injunction and allowing plaintiff to move its warehouse to Maryland will hamper the District's enforcement of its laws. However, plaintiff must "allow any member of the Board, any investigator of the Board, or any member of the Metropolitan Police Department full opportunity to examine, at any time during business hours, the premises where any beverage is manufactured, kept, sold, or consumed for which . . . a license has been granted." 35 D.C.Reg.D.C. 4947, 5002 (1988), amending D.C.Mun.Regs. tit. 23, § 707.1. If plaintiff fails to do so, the District can suspend or revoke its license. D.C.Code § 25-118(a).

Furthermore, the likelihood that the District would lose taxes is low, and the amount it would lose, if any, is unsubstantial. Issuance of the injunction may also help

preserve a competitor in the District alcoholic beverage wholesale market, helping to maintain competitive pricing and diversity of products available to consumers. Accordingly, the threatened harm to plaintiff substantially outweighs any harm that an injunction might pose to defendants and third parties, and issuance of the injunction serves the public interest.

APPENDIX C

[Filed Jun. 28, 1995]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 95-0226-LFO

MILTON S. KRONHEIM & CO., INC.,
Plaintiff,

v.

DISTRICT OF COLUMBIA, *et al.*,
Defendants.

MEMORANDUM

Plaintiff, an alcoholic beverage wholesaler licensed in the District of Columbia, filed its Complaint on February 2, 1995 seeking to enjoin enforcement of a provision of the District of Columbia Wholesale Liquor Industry Storage Act of 1986 which requires plaintiff to maintain its warehouse facilities in the District of Columbia.[1] Plaintiff sought to purchase a warehouse in Jessup,

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[1] Plaintiff also sought to enjoin an unwritten "come to rest" policy. Under that policy, the District of Columbia Alcoholic Beverage Control Board allegedly required any alcoholic beverage sold by a District wholesaler to a District retail customer to "come to rest" in the District for at least 24 hours prior to sale. In a representation in defendants' Opposition to plaintiff's Motion for Summary Judgment, "[t]he District concedes that there has been some confusion in the past about whether there is such a policy," but further states that "there is absolutely no such policy in the District of Columbia. . . . The only warehousing requirements are those set forth in the statute." Defs.' Opp. at 13.

Maryland, and asserted, without refutation from defendants, that "[i]f the transaction [did] not go forward immediately, the property [would] likely be sold to a competitor of Kronheim's who operates businesses in both D.C. and Maryland." Margolies Aff. dated Jan. 31, 1995, at ¶ 24. Because of its desire for immediate relief, plaintiff filed on the same day an application for a temporary restraining order and a motion for a preliminary injunction.

The following day, February 3, 1995, I held a hearing on plaintiff's application for a temporary restraining order. At the end of the February 3 hearing, I scheduled a second hearing for the following week, an evidentiary hearing on plaintiff's motion for a preliminary injunction. I then denied plaintiff's application from the bench primarily for failure to establish that the purchase of the property would have to occur before the preliminary injunction hearing, i.e. for failure to establish that plaintiff would suffer any irreparable injury before that time.

On February 10, 1995, an evidentiary hearing on plaintiff's motion for a preliminary injunction took place. The parties presented witnesses and made oral arguments on plaintiff's motion. In the interim, the parties had filed extensive briefs on both the substantive merits of plaintiff's case and the balance of equities in determining the appropriateness of injunctive relief. At the conclusion of the hearing and after having reviewed all the briefs, I granted plaintiff's motion from the bench. A Memorandum filed on February 24, 1995 elaborated that decision. *Kronheim v. District of Columbia,* 877 F. Supp. 21 (D.D.C. 1995). The greater part of that Memorandum addressed the substantive merits of plaintiff's case; namely, plaintiff's contention that the requirement that liquor wholesalers warehouse their goods in the District was a violation of the dormant Commerce Clause. As explained in that Memorandum, defendants were collaterally estopped from disputing that (1) the local warehousing

requirement facially discriminates against the kind of interstate commerce in which plaintiff is engaged; (2) the articulated purposes given for the requirement cannot withstand the "strict scrutiny" accorded facially discriminatory legislation; and (3) the Twenty-First Amendment does not validate the discrimination against the interstate commerce in which plaintiff is engaged. *Id.* at 25-27 (citing *Quality Brands v. Barry,* 715 F. Supp. 1138 (D.D.C. 1989) (Revercomb, J.)). I further rejected defendants' argument that the local warehousing requirement was not subject to dormant Commerce Clause analysis because it had been authorized by the Alcoholic Beverage Control Act, passed by *Congress* in 1934. *Id.* at 27-28. In sum, the February 24, 1995 Memorandum held that plaintiff had demonstrated "a substantial likelihood of success on the merits." *Id.* at 29.

In granting plaintiff's motion for a preliminary injunction, I further concluded that "the threatened harm to plaintiff substantially outweigh[ed] any harm that an injunction might pose to defendants and third parties, and issuance of the injunction serve[d] the public interest." I based that finding primarily on (1) the uniqueness of the warehouse plaintiff wished to purchase; (2) plaintiff's need to purchase the warehouse before the ultimate resolution of this complex constitutional litigation; and (3) the minimal harm to defendants of temporarily enjoining the enforcement of a statute likely to be declared unconstitutional. *Id.* at 29-30.

On March 9, 1995, defendants noticed an interlocutory appeal of the February 10, 1995 Order granting plaintiff's motion for a preliminary injunction.

On March 31, 1995, plaintiff filed a motion for summary judgment, "incorporating by reference the arguments previously made to the Court in connection with the preliminary injunction proceedings and the reasoning of the Court's memorandum filed February 24, 1995."

On June 13, 1995, defendants filed their Opposition to plaintiff's motion. Defendants raise no new legal arguments in their Opposition; they simply note further evidentiary development in the case. Defendants introduce evidence of the availability of warehousing facilities in the District that arguably would meet plaintiff's needs. Based on that evidence, defendants argue that "there is no overriding economic justification or necessity for plaintiff to move its warehouse facilities outside of the District; it is strictly a move of convenience." Defs.' Opp. at 8. In effect, defendants argue that plaintiff's "reason for not examining properties in D.C. is that Kronheim was looking only for the most economically advantageous location for consolidated operations." *Id.* at 11. From this evidence, defendants further infer that plaintiff was misleading when it asserted that continued maintenance of its warehousing operations in the District would result in a loss of its economic viability.

* * * *

Plaintiff has moved for summary judgment. Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c). The February 24, 1995 Memorandum explained in detail why the local warehousing requirement violates the dormant Commerce Clause. Defendants' additional evidence does not affect that analysis. Indeed, the fact that plaintiff was looking "for the most economically advantageous location for consolidated operations," as defendants argue, suggests precisely the sort of rationale the dormant Commerce Clause is meant to protect. In any case, plaintiff's reasons for wanting to move its warehouse to Maryland are irrelevant to the dormant Commerce Clause analysis, which, in this case, depends solely upon (1) principles of collateral estoppel; and (2) an interpretation of the Alcoholic Beverage Control Act of 1934. Thus, assuming for the purposes of plaintiff's pres-

ent summary judgment motion that plaintiff's relocation of its warehouse facilities to Maryland is a move of convenience and not "necessary" for its economic viability, plaintiff is entitled to summary judgment for the same reasons as those articulated in the Memorandum filed February 24, 1995. Accordingly, an accompanying Order grants plaintiff's motion for summary judgment.

Date: June 27, 1995

/s/ Louis F. Oberdorfer
United States District Judge

[Filed Jun. 28, 1995]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 95-0226-LFO

MILTON S. KRONHEIM & CO., INC.,
Plaintiff,

v.

DISTRICT OF COLUMBIA, *et al.*,
Defendants.

ORDER

For the reasons stated in the accompanying Memorandum and the Memorandum filed February 24, 1995, it is this 27th day of June, 1995, hereby

ORDERED: that plaintiff's motion for summary judgment should be, and is hereby, GRANTED; and it is further

DECLARED: that the local warehousing requirement embodied in D.C. Code § 25-114(f), as applied to plaintiff, would constitute an unconstitutional discrimination against interstate commerce in violation of the United States Constitution; and it is further

ORDERED: that defendants, their agents, employees and all other persons acting on their behalf are hereby PERMANENTLY ENJOINED from taking any action to enforce against plaintiff any and all laws, regulations and policies, whose effect is to require plaintiff to maintain its warehouse facilities within the District of Columbia; including but not necessarily limited to the local warehousing requirement imposed by D.C. Code § 25-114(f).

/s/ Louis F. Oberdorfer
United States District Judge

APPENDIX D

[Filed Oct. 28, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-7053

MILTON S. KRONHEIM AND COMPANY, INC.,
Appellee

v.

DISTRICT OF COLUMBIA, OFFICE OF THE MAYOR AND MARION S. BARRY, JR., Mayor, In his official capacity as Mayor of the District of Columbia,
Appellants

Consolidated with 95-7168

Before: SILBERMAN, SENTELLE and HENDERSON, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing filed September 9, 1996, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX E

[Filed Oct. 28, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-7053

MILTON S. KRONHEIM AND COMPANY, INC.,
Appellee

v.

DISTRICT OF COLUMBIA, OFFICE OF THE MAYOR AND MARION S. BARRY, JR., Mayor, In his official capacity as Mayor of the District of Columbia,
Appellants

Consolidated with 95-7168

Before: EDWARD:, Chief Judge; WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS and TATEL, Circuit Judges

ORDER

Appellee's Suggestion For Rehearing *In Banc* and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Tatel did not participate in this order.

APPENDIX F

A BILL

4-295

IN THE COUNCIL OF THE
DISTRICT OF COLUMBIA

Councilmember Councilmember David A. Clarke introduced the following bill, which was referred to the Committee on Public Services & Consumer Affairs

To require the holders of alcoholic beverage licenses to store alcoholic beverages in the District of Columbia.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Wholesale Liquor Industry Job Protection Act of 1981"

Sec. 2. Section 13 of the District of Columbia Alcoholic Beverage Control Act, approved January 24, 1934 (48 Stat. 327, ch. 4; D.C. Code, sec. 25-114), is amended by inserting the words "in the District of Columbia" after the words "describe the place".

Sec. 3. This act shall take effect after a thirty (30)-day period of Congressional review following approval by the Mayor (or in the event of veto by the Mayor, action by the Council of the District of Columbia to override the veto) as provided in section 602(c)(1) of the District of Columbia

* * * *

A BILL

5-139

IN THE COUNCIL OF THE
DISTRICT OF COLUMBIA

March 7, 1983

Chairman David A. Clarke introduced the following bill which was referred to the Committee on Consumer and Regulatory Affairs.

To require the holders of alcoholic beverage licenses to store alcoholic beverages in the District of Columbia.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Wholesale Liquor Industry Job Protection Act of 1983".

Sec. 2. Section 13 of the District of Columbia Alcoholic Beverage Control Act, approved Janaury 24, 1934 (48 Stat. 327; D.C. Code, sec. 25-114), is amended by inserting the words "in the District of Columbia" after the words "describe the place".

Sec. 3. This act shall take effect after a 30-day period of Congressional review following approval by the Mayor, (or in the event of veto by the Mayor, action by the Council of the District of Columbia to override the veto) as provided in section 602(c)(1) of the District of Columbia Self-Government and Governmental Reorganization Act, approved December 24, 1973 (87 Stat. 813; D.C. Code, sec. 1-233(c)(1)).

A BILL

IN THE COUNCIL OF THE
DISTRICT OF COLUMBIA

Chairman David A. Clarke introduced the following bill which was referred to the Committee on ————.

To require the holders of alcoholic beverage licenses to store alcoholic beverages in the District of Columbia.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Wholesale Liquor Industry Job Protection Act of 1985".

Sec. 2. Section 13 of the District of Columbia Alcoholic Beverage Control Act, approved January 24, 1934 (48 Stat. 327; D.C. Code, sec. 25-114), is amended by inserting the words "in the District of Columbia" after the words "describe the place".

Sec. 3. This act shall take effect after a 30-day period of Congressional review following approval by the Mayor (or in the event of veto by the Mayor, action by the Council of the District of Columbia to override the veto) as provided in section 602(c)(1) of the District of Columbia Self-Government and Governmental Reorganization Act, approved December 24, 1973 (87 Stat. 813; D.C. Code, sec. 1-233(c)(1)).

APPENDIX G

STATEMENT OF

DC WINE & SPIRITS WHOLESALERS ASSOCIATION, INC. BEFORE THE

COUNCIL OF THE DISTRICT OF COLUMBIA

ON

WHOLESALE LIQUOR INDUSTRY JOB PROTECTION ACT OF 1985

JANUARY 21, 1986

Mr. Chairman:

I am Paul L. Pascal of Pascal, Weiss & Peartree, Chtd., 1008 Pennsylvania Avenue, SE, Washington, DC 20003. I am here today as President and General Counsel of the DC Wine & Spirits Wholesalers Association, Inc. Our members are: Milton S. Kronheim & Co., Inc., 2900 V Street, NE, Washington, DC 20018; Washington Wholesale Liquor Co., Inc., 3015 V Street, NE, Washington, DC 20018; Beitzell & Co., Inc., 707 Edgewood Street, NE, Washington, DC 20017; and American Potomac Distributing Co., Inc., 6207 Blair Road, NW, Washington, DC 20011.

The following table demonstrates the scope and importance of our membership to the wine, spirits and beer industry and the D.C. economy as it relates to employment, vehicle ownership and real estate owned and/or leased.

Company	*Employees*	*Vehicles*	*Warehouse Sq. Feet*
Kronheim	150	16	60,000
Washington Wholesale	105	14	83,000
Forman	145	35	130,000
Beitzell	110	27	125,000
American Potomac	72	43	105,000
TOTALS	582	135	503,000

Our association strongly supports the Wholesale Liquor Industry Job Protection Act of 1985, (Bill No. 6-239), and urges its prompt passage by the Council so that its firm ties with the District of Columbia can be maintained and grow. We view this bill as a *job protection act*. This act will allow our members to continue to remain in the District of Columbia and continue to be a viable and vital force in the business community. If, on the other hand, this bill is not passed and our competition grows from across D.C.'s borders, our members will be forced to give consideration to relocating outside the District.

Permitting wholesalers outside of our Capital City to sell ABC products in the District will require our members to compete with suburban wholesalers who have the following advantages:

1. Lower real estate costs.
2. Lower corporate taxes.
3. Lower workers compensation insurance costs and lower insurance costs in general.
4. Lower labor costs.
5. Fewer crime related incidents.
6. Lower financing costs.

In my capacity as President of the Capital City Market Association, I am fully aware of the efforts of the executive, legislative and administrative branches of the District of Columbia to retain businesses in the city. As you are aware, I have been active in the efforts to retain Washington Beef, to rehabilitate the streets of the Capital City Market, to build the new Capital City Market warehouse and to otherwise enhance the Market and make the area a healthier business center to serve the District's needs. All of the above have cost the city millions of dollars for which it will reap millions more in benefits as time goes by.

The same results—that is, retaining business—can be obtained for the wholesale wine, spirits and beer distributors for no cost by passage of this bill. Furthermore, there is legislative precedent for bills that protect the business and other interests in this city. For example, city employees are required to reside in the city. Major portions of the goods and services for the District of Columbia must be purchased from minority firms located in the city. I would also suggest that there be set-asides for goods and services purchased by the District from D.C. based firms. Why shouldn't the regulated D.C. ABC industry have all the wine, spirits and beer wholesalers it oversees located in our Capital City where there will be no issue of extra-territorial jurisdiction? Our research shows that D.C. is the only city permitting outside distributor sales.

Our members have strong and lengthy ties with our city. American Potomac has been in business for 35 years; Beitzell 88 years; Washington Wholesale 40 years; Forman 40 years and Kronheim 83 years. When one visits Kronheim, hundreds of pictures adorn the walls reflecting the history of the company and its principals with the District of Columbia and indeed the nation itself. What a tragedy it would be to see that history and the wine, spirits and beer wholesale industry leave the city due to the failure of this body to pass this vital legislation to protect the wine, spirits and beer wholesale industry and the City itself. Thank you for your consideration of our needs.

Mr. Chairman, I will be glad to respond to any questions and we stand ready to assist the committee with any help needed to pass this vital legislation.

* * * *

January 21, 1986

APPENDIX H

WASHINGTON

[Logo]

WHOLESALE LIQUOR CO., INC.

May 5, 1986

HAND DELIVERY

Honorable John Wilson
Member, Council of the District
of Columbia
District Building, Room 121
1350 Pennsylvania Avenue, N.W.
Washington, D. C. 20004

Dear Council Member Wilson:

We are writing to express our strong opposition to an amendment introduced recently by Council Member Nadine Winter to Council Bill 6-329.

This Bill, the Wholesale Liquor Industry Storage Act of 1986, intends to require alcoholic beverages to be stored in the District of Columbia, facilitating thorough regulation by the ABC Board, and providing a unified consistent environment for all the members of the Wholesale Liquor industry licensed by the District government to do business in the District of Columbia.

The amendment would allow the only member of the wholesale industry currently storing and operating outside the District of Columbia to continue this practice. The amendment would also have the effect of foreclosing the other members of the industry from moving outside the District to achieve competitive equity.

Washington Wholesale Liquor Company has been in business in the District of Columbia for more than forty

years. We have recently made a major commitment to the District by moving to new quarters tripling our space and more than doubling the number of our employees. This million dollar commitment to the city was made in the face of keen and most attractive competition from the private and public sectors in Prince Georges County. But we believe in the vitality and economic future of the District, and we support the efforts of our customers whose businesses are exclusively here in the District.

If this amendment is allowed to pass, one wholesaler selling more than one quarter of a million cases in the District will be granted a special and perpetual privilege. This wholesaler who has recently taken a significant volume from wholesalers storing in the District will be awarded a continuing competitive advantage. District labor rates, union rules, unemployment and workmens compensation contributions, rent schedules and casualty insurance premiums will be avoided. Further erosion of District employment would be inevitable.

We respectfully urge you to vote No on this critical amendment.

Sincerely

/s/ Ray Gold
RAY GOLD
Vice President

cc: Mayor

Council Members

Paul Pascal, Esq.
President, Washington
Wholesale Liquor Dealers Association

APPENDIX I

STATEMENT OF
CAROL B. THOMPSON
DIRECTOR, DEPARTMENT OF CONSUMER
AND REGULATORY AFFAIRS

ON BILL 6-329

"WHOLESALE LIQUOR INDUSTRY
JOB PROTECTION ACT OF 1985"

BEFORE THE COMMITTEE ON CONSUMER
AND REGULATORY AFFAIRS

JANUARY 21, 1986

Good afternoon, Mr. Chairman, Members of the Committee, I am Carol B. Thompson, Director of the Department of Consumer and Regulatory Affairs.

Thank you for the opportunity to appear on behalf of the Executive on Bill 6-329, Wholesale Liquor Industry Job Protection Act of 1985.

This Bill would require all District of Columbia alcoholic beverage control licensees to store their alcoholic beverages in the District of Columbia.

The Executive supports this Bill because it will create and protect jobs for District of Columbia residents. This Bill would also increase the tax base because current and prospective licensees would have to use facilities in the city to store their beverages.

Under current law, the holder of a manufacturer's or wholesaler's license, the holder of a Retailer's License Class "A", or the holder of a Retailer's License Class "C", and Class "D", (issued for a passenger-carrying marine vessel or club car of a dining car on a railroad),

may store beverages, with the consent of the board, upon premises other than the premises designated in the license.

The proposed Bill would affect current and prospective wholesalers and holders of Retail Classes "A", "C", and "D" licenses in that they would be required to store beverages in the District.

At present there are 2 District wholesalers who have permission to store outside of the District. They are Majestic Distilling Co., at 7824 Eastern Avenue, NW and Quality Brands, Inc. (previously known as Kassoff, Inc.) at 3045 V Street, NE.

On December 3, 1980, the Alcoholic Beverage Control Board, under the provisions of D.C. Code Section 25-114, approved the request of Quality Brands, Inc., to store its alcoholic beverages in Glen Burnie, Maryland. It was subsequently learned that 18 of its warehouse employees, all of whom were District of Columbia residents, lost their jobs. They were informed by the company that their names would be placed on a list to be called when needed. The union representing the employees was locked out in the State of Maryland, and was unable to represent the employees.

There are other jurisdictions including Delaware and Connecticut which prohibit the storage of alcoholic beverages for sale outside of their jurisdictions. The state of Maryland and New Jersey specifically require that all beverages coming into the state for resale "come to rest for 24 hours" within the state in the wholesaler's licensed establishment. That is, the wholesaler cannot ship directly to a location within the state from a location outside of the state.

In order to enforce the provisions of this Bill, the ABC Division of the Business Regulation Administration would conduct regulatory investigations to establish patterns of non-storage activity, to observe the storage areas and to check bills of laden and invoices. Where violations are

in evidence, a citation would be issued whereby the wholesaler must appear before the Board to show cause why its license should not be revoked or suspended.

In order to ensure that the intent of this legislation is met we would suggest, however, that the bill contain a separate "prohibition" section which would affirmatively restrict any D.C. licensee from storing beverages for sale in the District, outside of the District. As the Bill is currently drafted, it would not be *mandatory* that the liquor be stored in the District of Columbia.

Again we thank you for this opportunity to present the Executive views on this Bill. We will be pleased to answer any questions the Committee might have for us at this point.

APPENDIX J

COUNCIL OF THE DISTRICT OF COLUMBIA

REPORT

District Building 14th and E Streets, N.W.
Washington, D.C. 20004 724-8000

To: All Councilmembers

From: Councilmember John Ray, Chairman
Committee on Consumer and Regulatory Affairs

Date: March 25, 1986

Subject: Bill 6-329, "Wholesale Liquor Industry Storage Act of 1986"

The Committee on Consumer and Regulatory Affairs reports favorably on Bill 6-329, the "Wholesale Liquor Industry Storage Act of 1986," and recommends its enactment by the Council of the District of Columbia.

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I. Purpose
II. Legislative History
III. Issues and Background
IV. Summary of Testimony
V. Section-by-Section Analysis
VI. Fiscal Impact
VII. Impact on Existing Law
VIII. Executive Comments
IX. Committee Action
X. Attachments

I. *PURPOSE*

The purpose of Bill 6-329, the "Wholesale Liquor Industry Storage Act of 1986," is to amend section 13 of the District of Columbia Alcoholic Beverage Control Act, approved January 24, 1934 (48 Stat. 327; D.C. Code, sec. 25-114), to require the holders of alcoholic beverage licenses to store alcoholic beverages in the District of Columbia, and to provide two years for those now permitted to store outside the District to come into compliance.

II. *LEGISLATIVE HISTORY*

July 17, 1981	Bill 4-295, the "Wholesaler Liquor Industry Job Protection Act of 1981," was introduced by Councilmember David Clarke and referred to the Committee on Public Services and Consumer Affairs.
October 20, 1981	The Committee on Public Services and Consumer Affairs conducted a public roundtable on Bill 4-295.
March 8, 1983	Bill 5-139, the "Wholesale Liquor Industry Job Protection Act of 1983," was introduced by Chairman David Clarke and referred to the Committee on Consumer and Regulatory Affairs.
October 28, 1985	Bill 6-329, the "Wholesale Liquor Industry Job Protection Act of 1985," was introduced by Chairman David Clarke and referred to the Committee on Consumer and Regulatory Affairs.
January 21, 1986	The Committee on Consumer and Regulatory Affairs conducted a public hearing on Bill 6-329.

March 25, 1986 — The Committee on Consumer and Regulatory Affairs scheduled Bill 6-329 for discussion and markup.

III. *ISSUES AND BACKGROUND*

Current law generally requires alcoholic beverage licensees to store beverages at their places of business in the District which are described on the license. The law, however, permits manufacturers, wholesalers, Class A retailers (package liquor stores), and passenger boats and railroads holding Class C and D retail licenses to store beverages at some other location if the Alcoholic Beverage Control Board grants permission to do so.

Because there are no statutory restrictions on the location of the alternative storage site, the Board has interpreted the act to permit storage outside the District. Thus, the District has apparently become unique among the states in permitting alcoholic beverage licensees to store beverages outside the licensing jurisdiction and beyond the effective control of the licensing authority.

The Department of Consumer and Regulatory Affairs has reported to the Committee:

> The states of Maryland and New Jersey specifically require that all beverages coming into the state for resale "come to rest for 24 hours" within the state in the wholesaler's licensed establishment. . . . Delaware and Connecticut prohibit the storage of alcoholic beverages for sale outside of their jurisdictions. In fact, based on the research done to date, we have found no jurisdictions which do not have prohibitions against outside storage." (See attachment, Letter from Carol B. Thompson, director of the Department of Consumer and Regulatory Affairs, March 12, 1986.)

All but two of the 17 wholesalers licensed by the District store their stock in the District as do all other

licensees. In 1980, the Board granted permission to Quality Brands Inc., trading in the District as International Distributors, to store beverages at a warehouse in Glen Burnie, Md. Majestic Distilling Co. has warehoused its stock at its headquarters facilities in suburban Baltimore for the past 20 years.

Prior to consolidating operations at Glen Burnie, International had stored merchandise for sale in the District at 3045 V Street, N.E., where it persently maintains a satellite office employing 30 persons. Eighteen District residents lost their jobs as a result of the consolidation. Majestic maintains a District presence with a small office at 7824 Eastern Avenue, N.W., staffed by a secretary and salesperson.

The Committee received evidence that wholesalers who warehouse outside the District benefit from lower overhead, lower insurance rates, and lower payroll costs as a result of a nonunionized work force, thus creating a competitive disadvantage for wholesalers who warehouse in the District. To compete effectively, other wholesalers are likely to transfer their warehouse operations to suburban jurisdictions, thus depriving the District of additional jobs for its citizens.

IV. SUMMARY OF TESTIMONY

Valerie Hlavacek, of the Business Regulation Administration of the Department of Consumer and Regulatory Affairs, spoke for the executive branch and expressed support for the bill. She stated that it would increase, create and support jobs for District residents and increase the District's tax base.

To enforce the storage requirement, the Business Regulation Administration would monitor wholesalers' bills of lading and invoices and would initiate proceedings before the Alcoholic Beverage Control Board to suspend or revoke the licenses of violators, she added.

Maurice Feldman, senior vice president and treasurer of Beitzell and Company, also spoke in support of the legislation. He stated that the lower costs of storage outside the District creates an unfair burden on those who warehouse in the District. During the past two years, he said, the cost difference has caused District wholesalers to lose more than 50,000 cases in distribution volume to International Distributors alone. Mr. Feldman said if this trend continues, District employees will have to be laid off and the District's tax base will shrink.

Chairman Ray asked Mr. Feldman what his firm would save by moving from the District. He replied that the cost of worker's compensation would be cut in half, insurance rates would be reduced by more than $100,000, and labor costs would be cut drastically. For instance, he said, "Our hourly labor cost per truck would be shaved from approximately $24 to approximately $17."

Paul L. Pascal, president and general counsel of the D.C. Wine and Spirits Wholesalers Association Inc., testified that passage of the bill would enable District wholesalers to continue and expand their District operations. "If, on the other hand, this bill is not passed and our competition grows from across D.C.'s borders, our members will be forced to give consideration to relocating outside the District," he cautioned. Suburban locations provide lower real estate costs, lower corporate taxes, lower costs of worker's compensation and other insurance, lower labor costs, fewer crime-related incidents, and lower financing costs, he said.

Chairman Ray asked Mr. Pascal whether the Council should permit wholesalers who presently warehouse outside the District a reasonable amount of time to move into the District. Mr. Pascal responded that no business should be hurt, and a reasonable compliance period should be allowed.

Harvey Kasoff, president of International Distributors, and *Larry C. Williams*, general counsel of the firm, testi-

fied in opposition to the bill. They said International had been a money-losing operation until it left the District as a result of a merger with Quality Brands. Enactment of the legislation, they stated, would force International to cease its D.C. operations.

In response to questions from Chairman Ray, Mr. Kasoff said said sales in the District account for 15 to 20 percent of the firm's total weekly distribution of about 9,000 cases. He identified "adequate facilities, a long-term lease, and lower overhead" as the factors leading to the move from the District. He said the firm would be unable to return to the District, even if the Council incorporates a grace period in the bill.

Phillip Feaster, president of Teamsters Local 639, spoke in support of the bill and presented a petition signed in 1981 by 80 employees of International requesting such action.

V. SECTION-BY-SECTION ANALYSIS

Section 2 amends Section 13 of the District of Columbia Alcoholic Beverage Control Act to add a new sentence stating "No licensee may store beverages upon premises outside the District of Columbia." The new sentence is inserted after the words "designated in the license." The amendment makes no change in the language permitting alternative storage sites with the consent of the Board. It simply requires that all storage sites must be in the District.

Section 3 provides a grace period of two years from the effective date of the act for wholesalers permitted to warehouse outside the District as of January 1, 1986, to come into compliance with the District storage requirement.

Section 4 contains the standard effective date.

VI. FISCAL IMPACT

Enactment of Bill 6-329 will have no discernible fiscal impact. Given the small number of wholesale licensees, it can be implemented by the present staff of the Department of Consumer and Regulatory Affairs.

VII. IMPACT ON EXISTING LAW

Bill 6-329 amends section 13 of the Alcoholic Beverage Control Act, approved January 24, 1934 (48 Stat. 327; D.C. Code, sec. 25-114).

VIII. EXECUTIVE COMMENTS

The executive branch expressed support for the bill and recommended revisions to more clearly state the prohibition on storage outside the District. The Committee Print has been revised accordingly.

XI. COMMITTEE ACTION

The Committee on Consumer, and Regulatory Affairs scheduled Bill .6-329 markup on March 25, 1986. After an explanation and discussion, Chairman Ray moved approval of the bill and report. The vote was as follows: Committee members voting yes:

Councilmember Ray
Councilmember Shackleton
Councilmember Wilson
Councilmember Smith

Committee members voting no:

Committee members voting present:

Committee members absent: Councilmember Jarvis

APPENDIX K

COUNCIL OF THE DISTRICT OF COLUMBIA
COUNCIL PERIOD VI
SECOND SESSION

THIRTY-SECOND LEGISLATIVE MEETING
ROOM 500, DISTRICT BUILDING
TUESDAY, APRIL 15, 1986

Whereupon, the City Council convened at 6:45 PM, pursuant to Notice.

PRESIDING

DAVID A. CLARKE, CHAIRMAN

Councilmembers-at-Large:

BETTY ANN KANE	CAROL SCHWARTZ
HILDA H. MASON	JOHN RAY

Ward Councilmembers:

FRANK SMITH	Ward 1
JOHN A. WILSON	Ward 2
POLLY SHACKLETON	Ward 3
CHARLENE DREW JARVIS	Ward 4
WILLIAM SPAULDING	Ward 5
NADINE P. WINTER	Ward 6
H.R. CRAWFORD	Ward 7
WILHELMINA ROLARK	Ward 8

* * * *

[25] CHAIRMAN CLARKE: That's out of order, It's been referred.

We go now the First Reading on Proposed Bills. Councilmember Ray, would you present the "Wholesale Liquor Industry Storage Act of 1986".

MR. RAY: So move, Mr. Chairman.

CHAIRMAN CLARKE: The bill is before us. Is there discussion?

MS. SCHWARTZ: Yes, Mr. Chairman. I have discussed. . . . If you all will recall, when this matter was brought up a couple of weeks ago, our General Counsel, Mr. Mize, said that he had legal concerns about this bill. In trying to do my own legal research into it, I find that Mr. Mize's legal problems with that bill are, I think, justifiable.

I know that it's lawyer against lawyer because I know certainly the committee chairman is also an attorney and does not have problems with this bill.

I have a couple of questions that I would like to ask the chairman at this point.

What state interest does the District of Columbia have in this law other than economic protection? And I do think we need to understand here that we're only dealing with two businesses.

CHAIRMAN CLARKE: Do you direct it to me?

[26] MS. SCHWARTZ: No, I'm sorry. You said the chairman.

MS. SCHWARTZ: I meant the chairman of the committee.

MR. RAY: Thank you, Mr. Chairman. The interest that we have. . . . Mr. Chairman, I might just add, after Ms. Schwartz finishes, I want to make a few comments for the record. The interest that we have, Mrs. Schwartz, is to audit the records of these companies, to check their warehouses to make sure that they're in compliance with the ABC laws of the District of Columbia, to make sure their licenses are posted correctly, to check each and every truck they own to make sure their licenses are

posted correctly, to make sure all the lettering and numbering of these trucks are correct and in accordance with our licensing laws, to make sure that their tax forms are file so that we can audit to make sure that they're paying the proper taxes to the District of Columbia because taxes are based upon the gallons they sell per year, and all other laws which comply with the District of Columbia.

Obviously, the District of Columbia inspectors have no control over interest that are located in Maryland and Virginia. So, that's why this law is important, not only Mrs. Schwartz from an economic reason, but from a regulatory reason, which is a function of the ABC Board in [27] this city.

At the end of this, Mr. Chairman, I would like to add a statement to the record and make it clear that this decision goes much further than economic reasons, but it's a result of a boneheaded decision made by the ABC Board, which interprets the laws as allowing them to exempt a couple of companies from our laws.

The law already requires that all of these companies be in the city. The companies that are here now cannot leave this city unless we so exempt them. This law is to make it clear that the ABC Board does not have that authority and we did not intend for them to exempt these companies.

MS. SCHWARTZ: Why is not the current law which allows exemption for good cause adequate to serve the purpose?

MR. RAY: Well, it may be adequate for you, Mrs. Schwartz. The Council will vote in a minute and decide whether it's adequate for them or not.

MS. SCHWARTZ: Are you at some point in your discussion going to address the General Counsel's legal concerns relating to this?

MR. RAY: That's an option I have, Mrs. Schwartz, in my discussion.

MS. SCHWARTZ: I hope so, because I am not an [28] attorney myself. I rely on attorneys for legal matters.

But here we have attorneys that are disagreeing on the legal appropriateness of this law. I don't like to pass a law that I think might be challengable. That's why it's my hesitation. That's why I hope that you will address that so that you can alleviate my hesitation.

CHAIRMAN CLARKE: Mrs. Schwartz, I might ask that, at this point, there be included in the record of the Council the discussion at the Committee of the Whole at which it was indicated that there were purposes beyond just job protection for this legislation.

If I recall, the General Counsel indicated a concern with the record, that the record only reflected the job protection's purpose. Your questions have helped bring forth other purposes for this legislation. We thank you for them.

Further discussion?

MR. RAY: Yes, Mr. Chairman.

Mr. Chairman, I assume that the comments I make here will become part of the record.

CHAIRMAN CLARKE: I incorporated those in the work session of the Committee of the Whole. I was trying to incorporate those.

MR. RAY: Fine. Mr. Chairman, I just wanted to point out a number of things.

[29] There was a great deal of discussion in terms of the witnesses who appeared in support of this regarding job protection. Obviously, when companies move out of the city, they take jobs with them. In many instances, people who live in the city, for whatever reason, may not be able to travel to Maryland or Virginia or wherever they locate. So, that is an aspect of it.

Obviously, a lot of people who have an interest in their jobs came down to testify and they pursued that angle. The committee can't and doesn't try to control the various testimony that is presented to the committee.

But Mr. Chairman, let me just address a couple of issues. The General Counsel pointed out that there were

two decisions in this area, one called Baccus Import Limited (phonetic spelling) which talked about the reach of the 21st amendment. And as many of you know and maybe those who do not, the 21st amendment states that the transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws, the laws of that state, is hereby prohibited. So, the 21st amendment gives wide range authority to states to control alcoholic beverages.

In this particular case which the General Counsel made reference to, they do talk in there a great deal about economic protection and point out that the 21st [30] amendment was not designed solely for that purpose.

But let's look at what that case was all about. This case dealt with a law in the state of Hawaii which, in effect, exempts a local produced brandy and pineapple wine from the state wholesale liquor excise tax. I mean, in other words, what Hawaii was trying to do was to give preferential treatment to one product which was grown in that state in detriment to the others to create a competitive edge. Indeed, what they said was it was to "encourage and promote the establishment of a new industry".

That's clearly what we're not doing here. We're not giving preferential treatment to any one. They all will be treated alike. In fact, if we're giving preferential treatment now, we're giving it to those who are outside.

The other case that the General Counsel made reference to involved a New York law. And in this particular law the New York law had stated its purpose is to promote the sale of and expand the market for New York State labeled wines. In effect, what the New York law did was to only allow wines produced exclusively from the New York State grapes to be sold in grocery stores in New York. In other words, no one can sell any other wine.

That's a far cry from this thing. There again creating a preferential treatment for one product—a product that's

grown only in their state. This law doesn't [31] do that. And while I think that the court, the Supreme Court, made it clear that this law was not—the 21st amendment was not designed exclusively for economic protection and to keep out competition, we're not trying to keep out competition from anyone. They can all come and compete on an equal basis.

I do not think that in any way diminishes the thrust of the First or 21st amendment for the states to regulate alcoholic beverages.

Also, as I stated earlier, Mr. Chairman, the law already requires that these industries be in the District of Columbia. The only way they could be outside is if the ABC Board in its wisdom grant them an exemption. And in 1979 the ABC Board interpreted the law as alowing them to do that. This law is to make it clear that, one, the ABC Board cannot do that. And the ABC Board should not be allowed to do that. If anybody is going to do that, the Council should do that. The Council has control over the ABC laws—but not only the ABC laws, but the ABC rules and regulations. Even if the ABC Board comes forth with a new regulation, it has to come to the Council for approval.

This law, Mr. Chairman, is a law which is consistent with our regulatory authorities. It's designed to do that. And as I pointed out earlier, we have to audit the records of these companies, we have to check to make [32] sure their licenses are in compliance, we have to check to make sure they are paying the taxes they're suppose to pay to the District of Columbia. And that's extremely difficult to do if they're located out in Maryland or Virginia or maybe in Delaware, if we continue on the road we're going.

And I think this law is consisetnt with the 21st amendment. And I do not see any problems.

Thank you very much.

CHAIRMAN CLARKE: Thank you very much.

Further discussion?

All in favor of the bill, let it be known by saying aye.

(A chorus of ayes.)

CHAIRMAN CLARKE: Opposed?

Thank you. The bill passes.

Thank you very much, Mr. Ray.

If the Council does not mind and without objection, I would like to take out of order the legislation pertaining to the compensatory time off emergency declaration. Because I received a letter from the Office of Intergovernmental Affairs that although that was sent to us during the recess and not before, we're bringing it up at the first meeting we could have brought it up, but it has to be passed and into law by midnight [33] tonight. So, it has to be enrolled and sent to the Mayor for signature tonight.

I wish they could have gotten it to us before. But they did not. And lest everybody have to stay here into the middle of the night, if you don't mind, without objection, I will move the "District of Columbia Compensatory Time Off Emergency Declaration Resolution of 1986" at the request of the Mayor.

Is there discussion?

Hearing none, all those in favor, let it be known by saying aye.

(A chorus of ayes.)

CHAIRMAN CLARKE: Opposed?

The ayes have it.

And I will move the "District of Columbia Compensatory Time Off Emergency Act of 1986".

* * * *

APPENDIX L

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

AFFIDAVIT OF MATTHEW E. MARGOLIES

Matthew E. Margolies, being duly sworn upon oath, deposes and states as follows:

1. My name is Matthew E. Margolies. I am the President and Chief Executive Officer and a Director of Milton S. Kronheim and Co., Inc. ("Kronheim"), an alcoholic beverage wholesaler licensed by the District of Columbia Alcoholic Beverage Control Board ("ABC Board") to do business in the District of Columbia ("D.C." or the "District"). I have been President and Chief Executive Officer of Kronheim for five years. I have been involved in the alcoholic beverage wholesale business for 29 years. During that time, I have worked as a D.C. warehouseman, a salesperson, a purchasing agent, general manager and president.

2. In my capacity as President and CEO, I am charged with overseeing and managing virtually all aspects of Kronheim's business. Therefore, I am very familiar with Kronheim's business, its financial condition, its needs and opportunities and surrounding market forces and conditions.

3. Except for the interruption mandated by Prohibition, Kronheim has conducted its alcoholic beverage wholesale business in the District of Columbia continuously for 92 years, from 1903 to 1995. Kronheim has a long and venerable history of involvement in civic, community, and philanthropic organizations in the Distrtct of Columbia.

4. Kronheim distributes beer, wine and liquor to retailers (including wine, beer and liquor stores, bars, restaurants and hotels) in the District of Columbia. Its approximately 80 suppliers (distillers of liquor, brewers, wineries and other beverage manufacturers) include Jim Beam, Seagrams, Heineken and Remy Martin.

5. The Kronheim Company, Inc. is a corporation organized and existing under the laws of the State of Maryland. The Kronheim Company, Inc. is a liquor, wine and beer wholesaler in Maryland that maintains its principal place of business and warehouse in Baltimore, Maryland. The Kronheim Company, Inc. is an affiliate of Kronheim. I am the Chief Executive Officer of both companies.

6. Kronheim presently leases space in two warehouses in the northeast quadrant of the District of Columbia. Those warehouses are inadequate to permit Kronheim to serve the District of Columbia market efficiently.

a. The larger warehouse, located at 2900 V Street, N.E., contains approximately 40,000 square feet of warehouse space and 17,000 square feet of office space. The facility was constructed circa 1950. Access to the warehouse is difficult for 18-wheel trailers because the loading docks of the warehouse face a narrow street. The warehouse has only two loading docks. This creates bottlenecks and inefficiencies in our warehouse operation. The warehouse ceiling at 2900 V Street is only 18 feet high. A portion of the warehouse's floor space is unusable for storage and efficient physical layout of the warehouse operation is impaired because the ceiling is supported by closely spaced floor-to-ceiling pillars throughout the warehouse. Kronheim's lease on the 2900 V Street facility expires on March 31, 1995.

b. Kronheim also leases a second warehouse that is contiguous to the first, whose floor space measures approximately 22,500 square feet. This smaller space has

essentially the same deficiencies as the facility at 2900 V Street N.E., making it similarly inadequate to serve Kronheim's needs. Kronheim's lease at the facility expires on Febraury 28, 1995.

c. Until January 31, 1995, Kronheim leased a third warehouse, having approximately 20,000 square feet of floor space, at 2920 V Street, N.E. The warehouse has similar deficiencies to the other two warehouses while affording less space. The 2920 V Street warehouse was recently sold. The purchaser took possession of the warehouse for its own use upon the expiration of Kronheim's lease on January 31, 1995.

d. Following the expiration of Kronheim's lease on the facility at 2920 V Street, the total floor space Kronheim currently leases is 62,500 square feet. Kronheim would require 100,000 square feet of storage space to efficiently inventory its goods in a separate "stand-alone" D.C. warehouse.

7. Kronheim has employed several commercial realtors in the past five years to attempt to locate alternative warehouse space. Based on that experience, I know that there are presently no available warehouses in the District of Columbia having 100,000 square feet suited to Kronheim's needs. Further, to the best of my knowledge, there have not been any such facilities available in the District at any time in the last five years.

8. Kronheim's business, like most alcoholic beverage wholesale businesses, operates on very thin profit margins. There are presently ten alcoholic beverage wholesalers operating in the District, making it a highly competitive market. Decreasing demand for alcoholic beverages and fierce competitive forces effectively limit wholesalers' ability to maintain profitability when costs increase. Conversely, cost reductions that appear small in absolute terms may make a substantial difference in a D.C. wholesaler's competitiveness and profitability.

9. The confidence of suppliers is critical to the viability of an alcoholic beverage wholesaler's business. Any sign of financial instability of a wholesaler can rapidly lead to the distintegration of its business.

a. Alcoholic beverage suppliers' appointments for brand distribution with wholesalers in D.C. are always exclusive distribution arrangements. That is, when a wholesaler has an arrangement to distribute certain products for a supplier in the District, that wholesaler is the only distributor of those products in D.C.

b. Based on my experience in the alcoholic beverage wholesaling business, I know that suppliers require uninterrupted service by wholesalers. Suppliers are also concerned with wholesalers' financial health because they demand aggressive marketing of their products. A wholesaler's ability to conduct such marketing is dependent on the wholesaler's financial health. Suppliers also regularly extend trade credit to wholesalers.

c. If a supplier believes that a wholesaler may be financially weak or vulnerable to other forces (for example, license suspension or revocation) that might cause a disruption in distribution service, reduced marketing efforts or a loss to the supplier of money extended on trade credit, the supplier is inclined to transfer its business to another wholesaler rather than risk such consequences.

d. To protect their position and their trade credit investment, suppliers routinely demand, and receive, financial statements from their wholesalers.

10. Suppliers' tendency to transfer their business if they are concerned about their present wholesaler's ability to continue to provide uninterrupted, high-quality service is encouraged by the intense competition in the Washington, D.C. alcoholic beverage wholesale market. I know from experience that if there is any hint that a wholesaler is weak or vulnerable, other wholesalers foster that per-

ception and aggressively seek the business of the vulnerable wholesaler's suppliers.

11. If some suppliers leave a wholesaler, the perception that the wholesaler is weak can quickly become a reality. As other suppliers become aware of the wholesaler's deteriorating position, they are likely to move their business elsewhere. I have seen this "domino effect" operate to force viable wholesale business to go out of business or into bankruptcy in a matter of months. Recent victims of this domino effect include the former Beitzell Company in the District and the former McCarthy-Hicks Company in Baltimore.

12. In my experience and observation, suppliers will transfer their business to another wholesaler if their present wholesaler is unable to provide service for even a brief period, because suppliers demand uninterrupted service. Therefore, even temporary suspension of a wholesaler's license effectively forces the wholesaler out of business because it rapidly loses all of its suppliers.

13. In the past year, Kronheim has lost the business of a number of major suppliers due to changes in brand ownership and other competitive forces. I understand and believe that those suppliers were satisfied with our performance and that their move was motivated by considerations unrelated to the service provided by Kronheim.

14. In the most recent fiscal year, Kronheim generated no operating profit from its D.C. operations. Kronheim derived all of its pre-tax income in 1994 from the proceeds of a life insurance policy collected after the death of a key officer and the reversion to Kronheim of the deceased officer's undistributed retirement benefits. Kronheim projects that it will lose money in 1995 unless it is able to significantly reduce costs.

15. Recently, I have been contacted by some of our current suppliers who are concerned about our ability to

continue to distribute their products. The loss of other suppliers and apprehension about our ability to continue to operate have combined to cause substantial concern among our suppliers. Because of these perceptions and concerns, I believe that a "domino effect" defection of Kronheim's suppliers to other wholesalers (as described in ¶¶ 9, 10, 11, and 12) is a very real, imminent possibility.

16. It has been my observation that wholesalers that lose suppliers due to perceived financial or operational weaknesses have tremendous difficulty regaining those suppliers' business and confidence.

17. It has also been my observation that wholesale alcoholic beverage business that go out of business because of loss of suppliers are invariably unable to reopen their business. In my 29 years in the alcoholic beverage wholesaling business, I have never seen a wholesaler go out of business and later re-enter the same market as a viable alcoholic beverage wholesaler.

18. In order to retain the confidence of its present suppliers, Kronheim must be able to show them that it is taking aggressive action to restore itself to profitability. I believe the only way we can do so is to consolidate our D.C. warehouse operations with those of our affiliate The Kronheim Company, Inc. in a larger and more efficient warehouse facility.

19. If Kronheim and its affiliate The Kronheim Company, Inc. could consolidate their warehouse operations in a single facility with features adequate to serve their combined warehouse needs, both companies could realize substantial economies and savings.

20. Based on careful study, Kronheim projects that the savings it would realize from consolidation of its warehouse and other operations with The Kronheim Company, Inc. in a single facility adequate for their combined needs would be enough to restore Kronheim to profitabil-

ity and allow it to continue to serve its suppliers and its customers.

21. Kronheim has been searching for five years to find an alternative facility that would suit its needs and those of its affiliate. With the single recent exception described below, we have been unable to locate a single facility, in the District or in Maryland, that would adequately serve our needs.

22. A facility meeting our needs recently became available for sale. The facility is located in Jessup, Maryland, fairly close to I-95, and in the center of the combined service areas of Kronheim and The Kronheim Company, Inc. The facility has total combined warehouse and office space of 210,000 square feet, 14 loading docks and an access area that can easily accommodate large 18-wheel trailers. The ceilings of the warehouse are 24 feet high and there are few support pillars on the interior warehouse floor. The facility also offers ample office space and refrigerated warehouse space. In addition, because it was built in 1973, the facility is more efficient and in better condition than the warehouses Kronheim currently leases. Finally, the Jessup warehouse provides 94 employee parking spaces. Kronheim's present warehouse provides only 8 parking spaces.

23. To the best of my knowledge, this facility's combination of features (location, size, space configuration, features and access) make it unique in the Washington-Baltimore corridor.

24. Kronheim now has the opportunity to consolidate its D.C. warehouse operations with those of its Maryland affiliate in the new Jessup facility. There is a "handshake" agreement to purchase the Jessup warehouse and the present owner tendered a written contract to Kronheim on January 27, 1995. If the transaction does not go forward immediately, the property will likely be sold to a competitor of Kronheim's who operates businesses in both

D.C. and Maryland and Kronheim will have lost its best chance to ensure its future financial viability.

25. If it is able to consummate the transaction, Kronheim intends to move its alcoholic beverage storage operation to the Jessup facility, and to transport its products directly from the Jessup warehouse to retailers in the District of Columbia.

26. At least three of nine wholesalers licensed to compete with Kronheim in the District of Columbia market presently store their inventories outside of the District of Columbia and transport them directly to retail customers in the District of Columbia: International Distributors (a division of Quality Brands, Inc.); American Potomac Distributing, Inc. and D.O.P.S., Inc. Upon information and belief, each of the foregoing wholesalers lawfully stores its inventory outside of the District. Further, each also has a Maryland alcoholic beverage wholesale business and each maintains a consolidated warehouse in Maryland for its combined Maryland and D.C. operations.

27. Kronheim's competitors' ability to consolidate their Maryland and D.C. warehousing operations outside of the District of Columbia generates substantial cost savings for those competitors. This makes it more difficult for Kronheim to compete.

28. If Kronheim obtains space in the Jessup warehouse but it is later prohibited from using it because of Defendants' regulatory requirements, the result would be a dramatic increase in Kronheim's and The Kronheim Company, Inc.'s costs because they would be forced to bear the cost of the Jessup facility without the reduction in costs that they would achieve by consolidating their warehouse operations. Kronheim could not survive under these circumstances.

29. Kronheim cannot afford to violate the District of Columbia's local warehousing law and policies and risk a license revocation or suspension. Such a loss of license

would cause suppliers to transfer their business to other wholesalers and force Kronheim out of business.

30. I believe the coincidence of several circumstances, including Kronheim's present and projected financial condition without the warehouse consolidation; the impending expiration of our warehouse leases in the District of Columbia; our loss of suppliers in the last year; and the accompanying likelihood of loss of additional suppliers if we do not take strong, immediate steps to assure suppliers of our present and future stability, make this an absolutely critical juncture for Kronheim. We have a narrow window of opportunity to consolidate our warehouse operations in a single centrally located efficient facility, and thereby resolve Kronheim's present dilemma and ensure its survival as an alcoholic beverage wholesaler serving the District of Columbia.

31. If Kronheim is unable to move to the Jessup facility, it will be forced to go out of business.

32. If Kronheim goes out of business, the District of Columbia will lose some of the excise taxes and all of the corporate income taxes paid by Kronheim, and all of Kronheim's employees, including 22 D.C. residents, will lose their jobs. Further, competition in the wholesale alcoholic beverage industry will decrease, injuring District alcoholic beverage retailers and consumers by forcing them to pay higher prices.

33. If Kronheim goes out of business, the volume and diversity of alcoholic beverages sold in the District will also decline. Although many of the brands Kronheim sells would likely be sold by other wholesalers, some will inevitably no longer be available in the District because they do not enhance other wholesalers' present product lines and marketing or because they compete with lines presently carried by other wholesalers.

34. I believe that the relocation of our warehouse facility would have little negative impact on the District

of Columbia. Kronheim would continue to maintain a corporate office in the District of Columbia. It would also would remain subject to District corporate income tax. Approximately 90% of the taxes Kronheim presently pays to the District are excise taxes on the sale of alcoholic beverages. After the move, excise taxes paid by Kronheim for its sales in the District of Columbia would remain stable. Because Kronheim presently leases warehouse space in the District, its landlords are responsible for related property tax and the District should not lose property tax revenue due to Kronheim's relocation of its warehouse space.

35. If Kronheim moves its warehouse operations to Jessup, it is our intent to minimize the impact of the move on the jobs of person presently employed in the District of Columbia by offering all of them jobs in the Jessup facility. Seventy-four percent of Kronheim's present employees live outside of the District of Columbia.

36. After Kronheim's move, it will continue to comply with all requirements of its license and other regulatory requirements imposed by District of Columbia law, with the single exception of the provision of the D.C. Code that requires alcoholic beverage wholesalers to warehouse their inventory within the District of Columbia, a provision which Kronheim believes to be an unconstitutional discrimination against interstate commerce.

37. Kronheim intends to maintain a corporate office and a small warehouse in the District. Kronheim also intends to take all reasonable steps to facilitate inspection of its records, trucks and inventory by appropriate District authorities.

38. Currently, the District of Columbia does not inspect alcoholic beverages that Kronheim stores in its warehouses in the District of Columbia prior to the sale and distribution of those goods to retailers in the District. In my experience and to the best of my knowledge, the

District of Columbia has never conducted such inspections of goods stored in the District by alcoholic beverage wholesalers prior to sale.

39. Kronheim has an unblemished regulatory record in the District of Columbia. To the best of my knowledge, never in its 92-year existence has Kronheim been cited for any violation of District law or regulations. To the best of my knowledge, Kronheim has never before initiated a lawsuit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 31, 1995.

/s/ Matthew E. Margolies
MATTHEW E. MARGOLIES

APPENDIX M

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

AFFIDAVIT OF MATTHEW E. MARGOLIES

Matthew E. Margolies, being duly sworn upon oath, deposes and states as follows:

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1. I incorporate by reference my entire first affidavit dated January 31, 1995, ¶¶ 1-39. I submit this additional supplemental affidavit at the request of Judge Oberdorfer, in lieu of "direct" testimony at the hearing on the Preliminary Injunction scheduled for February 10, 1995.

2. Kronheim has approximately 60 suppliers. It has exclusive brand distribution arrangements with each of its suppliers. As a result of exclusivity, our suppliers rely on us to market their products and insist upon regular, often daily, distribution to retailers. In an average week, we receive approximately 40-50 deliveries containing 20,000 cases of product from our suppliers.

3. Kronheim operates a high-volume, high-inventory-turnover business. We have approximately 1800 retail customers in the District of Columbia. Some of our customers require 6-8 deliveries per week. In an average week, Kronheim delivers approximately 20,000 cases of beer, wine and liquor to its customers. Retailers generally require and expect very short order-to-ultimate-delivery schedules. Kronheim's customers frequently demand special or supplemental deliveries on very short notice. Our entire warehouse inventory "turns over" (is completely replaced) approximately six times per year. I believe if we had a more efficient facility, our inventory would turn over approximately 9-10 times per year.

BEST AVAIL

4. Kronheim's operations facility needs are driven by the nature of our business. A high volume, high inventory turnover business demands great mechanical coordination and substantial automation. Many times each day, Kronheim must take deliveries from its suppliers; place them in inventory storage; take orders from its customers; remove ordered items from inventory and transport them to delivery trucks; and strategically load the delivery trucks to allow each truck to make deliveries to numerous retailers efficiently during the few business hours retailers are able to accept deliveries. Because of the very narrow profit margins in the industry, Kronheim must be able to perform all of these operations quickly and extremely efficiently. Our operations facility must therefore be equipped with conveyer belt systems, a computer controlled inventory system, multiple loading docks and bays and a floor layout that allows easy mobility of forklifts and other necessary heavy equipment. Our operations facility must also have substantial refrigerated storage capacity, to store perishable alcoholic beverages.

5. Kronheim has carefully studied the cost savings offered by a consolidation of its operations facility space with its affiliate in the Jessup facility. We estimate Kronheim's total cost savings from consolidation of its operations facility in Jessup at approximately $800,000 per year.

6. In December 1994, Kronheim became aware that the Jessup facility had a new owner who might be interested in reselling the Jessup facility. After negotiations, Kronheim reached an agreement in principle with the seller on January 9, 1995 to purchase the Jessup facility. Kronheim estimates that the total cost of the facility and equipment would be approximately $8 million. The seller tendered to Kronheim unexecuted contracts embodying our agreement in principle on January 27, 1995.

7. The seller must close the complex transaction involving this property on or before March 14, 1995.

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In order to allow both parties to complete all the necessary reviews, inspections, financing arrangements, and various other tasks necessary to close this transaction by March 14, 1995, Kronheim must sign the purchase contracts in the next few days. The seller and Kronheim are scheduled to meet on Tuesday, February 4, 1995 to finalize the agreements.

8. The seller has informed me that if Kronheim does not sign the agreements in the next few days, the seller will sell the Jessup facility to another buyer, in order to allow the seller to close by March 14, 1995. I do not know precisely how many days Kronheim could delay signing the contract without losing the building. I firmly believe the Jessup facility will not be available two weeks from today. If Kronheim is unable to consolidate its warehouse operations in the Jessup facility, it is unlikely to survive as a profitable stand-alone entity.

9. There are currently four wholesalers of wine, beer and spirits licensed to do business in the District of Columbia. Those four major wholesalers account for approximately 75% of the gross wholesale sales of alcoholic beverages in the District of Columbia. Three of the major wholesalers also have affiliates that operate in Maryland. The fourth, Forman Brothers, Inc., does not have a Maryland operation. In addition to the four major wholesalers, there are six other wholesalers licensed to do business in D.C., making a total of ten wholesalers operating in the District of Columbia.

10. Three of the ten alcoholic beverage wholesalers licensed to do business in D.C. lawfully store their inventory outside of the District of Columbia. Each of those three (Quality Brands, Inc., American Potomac Distributing, Inc. and D.O.P.S., Inc.) also has a Maryland wholesale business and each has consolidated its warehouse operations for Maryland and D.C. in a single Maryland facility.

11. Kronheim decided against applying to the ABC Board for an exemption from the local warehousing requirement for two basic reasons. First, Kronheim understands that the current position of the D.C. Alcoholic Beverage Control (ABC) Board is that it will not grant additional exemptions from the law. Second, the review process is very slow. I understand it took two years for the ABC Board to review and approve the most recent exemption from the requirement, granted to American Potomac Distributing. If Kronheim were forced to wait even two weeks for the Board to decide, the reason for applying for an exemption—the availability of the Jessup facility—would no longer exist.

12. I am the primary individual who made the decision to file a lawsuit to attempt to force the District of Columbia to allow Kronheim to maintain its operations facility outside of the District of Columbia. This was a difficult decision because the risks of filing suit are substantial. I believe disclosures of sensitive or confidential business information necessitated by this suit will very likely harm Kronheim, particularly if the Court denies Kronheim's request for a preliminary injunction. In Kronheim's very competitive market, for any wholesaler to declare in a public forum that it will go out of business if it is unable to consolidate its warehouse operations is a very risky course of action. As I described in my first affidavit, suppliers tend to transfer their business if they perceive a wholesaler to be financially weak or to pose a risk of interruption of delivery or reduction in the quality of service or marketing provided by their present wholesaler. Upon information and belief, all of Kronheim's competitors have obtained copies of public court documents filed in this lawsuit. I believe Kronheim's competitors are currently using the information contained in those documents to portray Kronheim to its suppliers as financially weak, in an effort to obtain those suppliers' business. I also believe there is a very real possibility that many of Kronheim's suppliers will transfer their business.

Some may not even wait to hear the outcome of Kronheim's preliminary injunction motion. As I also described in my first affidavit, defection of some suppliers tends to cause a "domino effect" loss of additional suppliers, which can rapidly lead to the demise of a wholesale business.

13. After consultation, I decided on about January 20, 1995, to file a lawsuit to vindicate Kronheim's rights to engage in interstate commerce by consolidating its warehouse operations in the Jessup facility. Although the risks of filing suit are very substantial, those risks are preferable to the near certainty of business failure if Kronheim is prohibited from consolidating its warehouse operations with its affiliate in the Jessup facility. I believe I owe it to Kronheim's owners and Kronheim's eighty-four employees and their families to take action to allow Kronheim to pursue a unique business opportunity that will allow the company to continue in business and prosper. Despite the risks, fighting to ensure Kronheim's future financial viability is a better course than passively continuing on a course likely to end in the demise of a business that has served the D.C. market and community for nearly a century.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 10, 1995.

/s/ Matthew E. Margolies
MATTHEW E. MARGOLIES

APPENDIX N

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Licenses, Investigations and Inspections
Office of Alcoholic Beverage Control

[Logo]

[Address Omitted]

July 12, 1979

Gary L. Ryan, Esquire
McDermott, Will & Emery
Suite 1201
1101 Connecticut Avenue, Northwest
Washington, D.C. 20036

Re: International Distributing
Corporation
3025 "V" Street, Northeast
Holder of a Wholesaler's
License Class "A"
Application No. 197

Dear Mr. Ryan:

I am responding to your letter of June 29, 1979.

The Board APPROVES your client's (International Distributing Corporation) request to store alcoholic beverages outside of the District of Columbia at 226 Dover Road, Glen Burnie, Maryland, pursuant to Section 13 of the District of Columbia Alcoholic Beverage Control Act (D.C. Code 25-114, 1973 Edition)

Upon receipt of this letter please submit your alcoholic beverage control license to the Office of Alcoholic Beverage Control for amendments to include 226 Dover Road, Glen Burnie, Maryland.

BY ORDER OF THE BOARD.

Very truly yours,

/s/ Benjamin J. Chaplin
BENJAMIN J. CHAPLIN
Chief Investigator

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-1999
United States District Judge
George W. Revercomb

QUALITY BRANDS, INC.,
Plaintiff

v.

MARION S. BARRY, JR., *et al.*,
Defendants

DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSION, TO PLAINTIFF'S SECOND REQUEST FOR PRODUCTION OF DOCUMENTS AND TO PLAINTIFF'S THIRD SET OF INTERROGATORIES

Pursuant to Federal Rule of Civil Procedure Nos. 33, 34, and 36, defendants, through undersigned counsel, respond to plaintiff's first set of requests for admission, to plaintiff's second request for production of documents and to plaintiff's third set of interrogatories as follows:

Request for Admission No. 1. Admit that there have been no instances or cases since 1979 in which officials of the District of Columbia have encountered any difficulty in obtaining access to the records of any licensed District of Columbia liquor wholesaler who was granted permission to store alcoholic beverages intended for sale to District of Columbia retailers in a warehouse located outside of the District of Columbia.

Response: Defendants admit that there are no instances known to them, since 1979, in which officials of the Dis-

trict of Columbia have been denied requested access to records of either of the two licensed District of Columbia liquor wholesalers who were granted permission to store alcoholic beverages intended for * * *

* * * *

the warehouse facilities of either of the two licensed District of Columbia liquor wholesalers who were granted permission to store alcoholic beverages intended for sale in the District in a warehouse located outside the District. Otherwise, this request for admission is denied.

Interrogatory No. 5. If your response to Request for Admission No. 5 is anything other than an unqualified admission,

(a) describe each and every instance, case, circumstance and/or fact forming the basis for your denial or qualification;

(b) identify each and every person having knowledge of each such instance, case, circumstance and/or fact;

(c) identify each and every document reflecting, relating to or relevant to each such instance, case, circumstance and/or fact; and

(d) identify the persons consulted, the files and records searched, and the other steps taken by you in order to determine the truth or falsity of the statement contained in Request for Admisison No. 5.

Answer: See the answer to Interrogatory No. 1.

Request for Admission No. 6. Admit that there have been no specific instances or cases since 1979 in which officials of the District of Columbia have determined that there has been any failure by Quality Brands, Inc., or International Distributors to comply with any provision of the District of Columbia Alcoholic Beverages Control Act, the regulations issued thereunder, or any applicable licensed condition, other than the requirements of the Wholesale Liquor Industry Storage Act of 1986.

Response: Defendants admit that, except for the failure to comply with the statutory requirement that all alcoholic beverages intended for sale in the District be stored in the District, there are no instances known to them, since 1979, in which Quality Brands, Inc. or International Distributors have failed to comply with the District of Columbia Alcoholic Beverage Control Act, the regulations issued thereunder or any applicable license condition.

Interrogatory No. 6. If your response to Request for Admission No. 6 is anything other than an unqualified admission,

(a) describe each and every instance, case, circumstance and/or fact forming the basis for your denial or qualification;

(b) identify each and every person having knowledge of each such instance, case, circumstance and/or fact;

(c) identify each and every document reflecting, relating to or relevant to each such instance, case, circumstance and/or fact; and

(d) identify the persons consulted, the files and records searched, and the other steps taken by you in order to determine the truth or falsity of the statement contained in Request for Admission No. 6.

Answer: Not applicable.

Request for Admisison No. 7. Admit that there have been no * * *

* * *

DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of
American Potomac
Distributing Company
Wholesalers License Class "A"
Application No. 780

ORDER

This matter came before the District of Columbia Alcoholic Beverage Control Board ("Board") pursuant to the request of American Potomac Distributing Company ("American Potomac") to store its inventory in its Maryland warehouse temporarily until a suitable warehouse is located in the District of Columia to which to return.

The policy and practice of the Alcoholic Beverage Control Board since 1934 is that alcohol beverage wholesalers store alcohol to be sold in the District within the District's boundaries. This is a practice that the Board adheres to today. In considering American Potomac's request, the Board relied on the Alcoholic Beverage Control Act, D.C. Code Sec. 25-114 (1987), in pertinent part section 13, and on Reorganization Order 50—Office of the Corporation Counsel, D.C. Code 1973, Title 1, App. at 180.

In reviewing American Potomac's request, the Board reviewed the transcripts from one preliminary hearing (March 10, 1993), and one factfinding hearing (August 19, 1993), reviewed the documents submitted to supplement the hearings including blue prints, charts and diagrams of the facility, and reviewed the findings of the ABC auditor regarding the financial records of the license.

Based on the above, the Board finds:

1] The facility at American Potomac's present location is no longer adequate nor efficient for productive operations, causing unnecessary and prohibitive costs to the

running of a wholesaler operation; to wit, producing economic hardship.

2] The ABC auditor's view confirmed the representations of American Potomac that it has been operating at an average loss of $55,000 per month since 1990. IRS records indicate a loss of $519,795 in 1990 and $463,030 in 1991.

3] American Potomac wishes to lease or buy new space in the District of Columbia for its wholesale operation and entire business.

4] American Potomac has been attempting to locate different warehouse space in the District of Columbia since 1987. In so doing, American Potomac has been in contact with the District's Office of Economic Development (including the research and marketing division) and with at least one commercial real estate firm throughout the search, and as recently as August 1993. Neither the District government nor the commercial real estate firm has been able to identify suitable warehousing space for the licensee's needs.

5] Existing warehousing space in the District of Columbia is not suitable for American Potomac's needs. To renovate existing space or to build a suitable warehouse on existing land would take a minimum of two years to be ready for habitability.

6] Razing the current American Potomac warehouse and rebuilding a warehouse on the current site is not an option for two reasons: a) the current facility is on three acres of land and American Potomac needs at least seven acres to build a suitable efficient warehouse; b) it would take *at least* two years to build a new warehouse.

7] American Potomac testified that though it wishes to store temporarily its inventory outside DC, *it will maintain all other aspects of its operations in the District of*

Columbia including its records and its accounting, billing, sales and executive offices.

8] Storing beverages outside of the District of Columbia has no effect on excise taxes paid to the District of Columbia since the excise tax is imposed on the *sales* of alcohol. (Corporate income taxes to the District of Columbia are based on the profit of a business.)

9] Nineteen of American Potomac's 100 employees would be affected if inventory were stored outside of DC. Of these 19 employees, 13 are District residents. American Potomac testified on the record that it will not terminate these employees because of a temporary move and these employees, residing in the District of Columbia, have been polled and have indicated that working temporarily in Maryland will not cause them to leave their jobs. In addition, American Potomac stated that it will give priority consideration to District residents when hiring for any reason.

10] American Potomac will tag all its vehicles delivering in DC with District of Columbia license tags, whether its inventory is stored in DC or Maryland.

11] American Potomac has discussed the possibility of storing its inventory temporarily in Maryand with the Maryland Alcoholic Beverage Commission. The DC ABC Board's inspection and enforcement authority will not be compromised by temporary storage in Maryand.

12] The President of American Potomac stated that if the ABC Board allows American Potomac temporarily to store its inventory outside DC, American Potomac will work closely with the DC Office of Economic Development to relocate its inventory within DC within two years, including serving or working with the task force set up by the Office of Economic Development and the private sector to keep businesses in DC and to draw new businesses to DC.

13] The President of American Potomac stated, if the ABC Board granted American Potomac's request temporarily for a two year period, the space leased outside DC would be leased to another entity when relocating its inventory in DC. Thus, a lease commitment outside DC will not be an argument American Potomac can raise against relocating its inventory back to DC within two years.

The Alcoholic Beverage Control Board, having reviewed the above referenced record of American Potomac's request to store temporarily its inventory outside the District of Columbia and, incorporating this record into its order, concludes:

—that American Potomac is suffering economic hardship in its current facility;

—that American Potomac, the District of Columbia government, and private commercial realtors, together and/or separately, have not been able to identify suitable warehouse space in DC for American Potomac to relocate its inventory within DC;

—that storing inventory temporarily outside DC will not diminish tax revenue to the District of Columbia and will most likely increase tax revenue to the District;

—that no District residents will lose their jobs because of storing inventory outside DC;

—that temporary relief from economic hardship for the licensee will prevent bankruptcy or consolidation, both of which would result in the loss of jobs and revenue for DC, and that temporary relief will allow the licensee to relocate its inventory to DC in a strengthened and more healthy condition to create more jobs and revenue for DC.

Therefore, to preserve jobs and revenue for the District of Columbia, it is hereby ORDERED that American Potomac shall be permitted to store its inventory temporarily outside

the District of Columbia for the period of its current license (1993-1995). At the expiration of its current license, or as soon thereafter as suitable space is available, American Potomac shall relocate its inventory to a site in the District of Columbia.

It is further ORDERED that this order shall constitute additional terms and conditions of the license, and that American Potomac Distributing Company agrees to be bound by and held in compliance with this order.

It is further ORDERED that failure to comply with this order may result in the suspension or revocation of the Wholesalers License Class "A", Application No. 780 for American Potomac Distributing Company.

/s/ Mary Eva Candon
MARY EVA CANDON, ESQ.
Chairman
The Alcoholic Beverage
Control Board of the
District of Columbia

/s/ Michael O. Minnig
MICHAEL O. MINNIG
President
American Potomac
Distributing Company

/s/ Merci L. Drake
MERCI L. DRAKE
Member

/s/ James C. Jefferson
JAMES C. JEFFERSON
Member

/s/ James L. O'Dea
JAMES L. O'DEA, ESQ.
Member
ABSTAIN
BARBARA LEE SMITH, ESQ.
Member

Date: September 28, 1993